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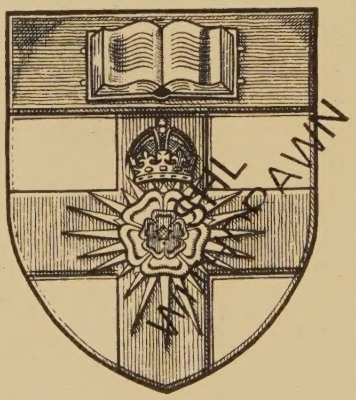

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PREFACE

THIS volume contains the weekly public lectures on Current Legal Problems delivered in the Faculty of Laws at University College, London, during the session 1953–1954, and Professor Jolowicz's Presidential Address to the Bentham Club.

Once again, the contributors, publishers and printers have assisted in the speedy publication of this volume. We should like to thank them for their co-operation, and also Miss Valentine Latham, the Assistant Editor of this volume, for having read the proofs and for having compiled the Tables of Cases, Statutes and Treaties, as well as the Index.

THE EDITORS

University College, London
April, 1954

THE CIVIL LAW IN LOUISIANA[1]

H. F. Jolowicz

In the world today there are three important jurisdictions in which the common law and the civil law come into close contact and, to some extent, into competition : South Africa, the Province of Quebec, and Louisiana. South Africa differs from the other two countries in that the civil law came to her through Dutch jurists and in an uncodified form, whereas both Quebec and Louisiana received nearly all their civilian material through French channels and possess civil codes having close affinities with that of Napoleon. All three jurisdictions, however, have at least this much in common, that the most intrusive element of the common law has been its system of quoting and adhering to precedents, and in Louisiana, at any rate, it is the doctrine of *stare decisis* which arouses the greatest antagonism among adherents of the civilian system.[2] However true it may be that Continental courts are nowadays in fact guided by the large literature of reports that has been created in every country, in a jurisdiction where the two systems compete the contrast is still strongly felt between what, by a sort of shorthand, we may call the 'civilian deductive' and the 'common law inductive' method. By these phrases, I do not mean to imply that there is anything specially Roman about deduction; the word 'civilian' is used here, as frequently in the United States, simply by way of contrast to 'common law'.

[1] I received a great deal of help, for which I am very grateful, from several members of the College of Law while I was at Tulane University, but I should like to express my thanks for assistance in connection with this address especially to Professor Ferdinand F. Stone, Director of the Institute of Comparative Law, who made several valuable suggestions and corrections, to Professor Eugene A. Nabors, Faculty Adviser to the *Tulane Law Review,* and to Professor Leonard Oppenheim, its Librarian.

[2] For *stare decisis* in Quebec, see P. B. Mignault, *Les Rapports entre le Droit Civil et la Common Law au Canada,* Et. Lambert (1938), pp. 87–93 at p. 92, and 'The Authority of Decided Cases' (1925) 3 *Canadian Bar Review,* pp. 1–24 at pp. 18–23. Cf. H. H. Davis, *The Common Law in Canada* (1939), 'The Future of the Common Law', pp. 164–199 at p. 194, where he says that the authority of decided cases is 'something less' in Quebec than in the other Provinces. See also R. H. Graveson, *De l'influence de la common law sur les systèmes de droit Civil éxistant dans le Commonwealth britannique* (1953) *Revue internationale de droit comparé,* No. 4, pp. 1–14, for *stare decisis* in South Africa and Quebec at pp. 7 and 13 respectively.

Before I went to Louisiana I knew, of course, that her legal system figured in the usual lists among those of the 'civilian' as opposed to the 'common law' type. I also knew a little more because I had read, when it came out in the Studies presented to Professor Lambert in 1938, a 'debunking' article by Mr. Ireland.[3] He pointed out that the field in which common law applied in the State was very wide, and that common law technique was accepted without question; he also conjectured that about 75 per cent of the Bar would be unable to use foreign civilian literature because they could not read even French. He listed the comparatively few subjects which did still come under civil law principles and ended with the proposition that Louisiana should now be considered a common law State whose legal system did not differ except in degree from those of other States in which some form of civil law had formerly prevailed and which still retained important traces of their old institutions. Such were California, New Mexico and Texas, though there the former system had been Spanish, not French as in Louisiana. Nor did he deplore this development. On the contrary, he thought the time had come when Louisiana, though proud of her legal history, should make up her mind to act in future as her neighbours did, and hope that they, forgetting her different origins, would admit the decisions of her courts to an equality with those of the remainder of the family.

I hoped to find out more on the spot, and when I did arrive, one of the first things I discovered was that Mr. Ireland's article, though it expressed opinions shared by many competent people, had also aroused considerable dissatisfaction because in recent decades there had been a notable renascence of the civil law. True, the movement to forward it was largely academic in origin, but to say that does not necessarily damn it in America, where law teaching is more closely integrated with practice than it is in this country.[4] It must also be remembered that this integration

[3] 'Louisiana's Legal System Reappraised' (1937) 11 *Tulane Law Review*, pp. 585–598; translated as *La Louisiane; vue nouvelle de son système de droit*, Et. Lambert, II, pp. 94–102.

[4] Cf. Henry G. McMahon, 'The Proposed Louisiana Code of Practice: A Synthesis of Anglo-American and Continental Civil Procedures' (1953) 14 *Louisiana Law Review*, pp. 36–61 at p. 37: 'The great improvement in legal education in Louisiana which commenced roughly thirty years ago, brought an almost immediate revival of interest in its civil law and procedure'.

is achieved in part through the Law Reviews published by the University Law Schools, and in Louisiana the *Tulane Law Review* has been the chief medium through which the civilians have exerted their influence on practitioners. Its first appearance under its present title in 1919 corresponded with the pioneering efforts of the College of Law, Tulane University, in the reform of legal education, and the high standard maintained in the *Review* has secured the continuance of professional interest. Another academic institution, the Tulane Institute of Comparative Law, has also worked in the same direction. It attracts scholars from civilian countries as well as from others, and the geographical position of New Orleans provides special opportunities for the study of Latin-American systems of law.

It is not for a foreigner to judge, more especially not for one who spent so short a time in the country as I did, but I can perhaps explain some of the points at issue and what it is that the civilian lawyers of Louisiana have in mind.

But first I must say something of the very complex legal history involved. In the beginning—and it is wonderful to have to do with a hemisphere in which the beginning can usually be dated pretty exactly—the law of Louisiana was French. As in Canada, it took the form of the Custom of Paris, which was imposed by the Charter granted to Antoine Crozat in 1712 and again, after he had failed to make the colony pay, to John Law's 'Western Company' in 1717.[5] In 1762, however, by a secret treaty, France ceded Louisiana to Spain, and when in 1769 the Spanish governor, Don Alejandro O'Reilly, finally took effective possession, he abolished the French law by proclamation, and substituted the Spanish for it. Owing to the difficulty of finding the necessary books on the spot, he provided an abstract of this law to serve for the time being,[6] but the change meant that Spanish authorities of various dates and including the great Romanist collection of the thirteenth century known as *Las Siete Partidas* became, at any rate in theory, the law of the land.

The French inhabitants did not originally welcome the

[5] Wigmore, 'Louisiana, The Story of its Legal System' (1916) *Southern Law Quarterly*, pp. 1–15 at p. 2.

[6] See *e.g.*, Moreau Lislet and Henry Carleton, *The Laws of Las Siete Partidas which are still in force in the State of Louisiana. Translated from the Spanish* (2 vols, New Orleans, 1820), Preface, xx. This work was commissioned by the Legislature.

change in sovereignty—and indeed a conspiracy against the Spaniards was bloodily suppressed—but they became reconciled to it; the new rulers merged with the upper classes of the population and it does not appear that the Spanish law caused any serious resentment.

Matters were different a generation later when the sovereignty changed again. Louisiana was retroceded to France by the Treaty of San Ildefonso on October 1, 1800, but the French authorities did not actually take over until November 30, 1803, and then only for less than a month, for on December 20 of the same year, in accordance with the Louisiana Purchase Agreement between France and the United States, possession was formally handed over to the representative of the United States Government.

It has been held that the temporary reassertion of sovereignty by France provided a justification for the large measure of French law in the shape of borrowings from the *Code Napoléon* which was to be introduced in the ensuing years,[7] but the more general view today is that as the short-lived French Government did nothing to introduce French law (whatever may have been intended) the ordinary rule of international law applied that the private law of ceded territory remains in force until the new sovereign changes it. On this showing the Spanish law continued into the period of American rule.[8] Then, however, changes began immediately. The Constitution of the United States became the supreme law of the land and thus impliedly abolished provisions inconsistent with it, such, for instance, as limitations on the liberty of the press. Federal statutes on bankruptcy, inter-State commerce and other subjects applied, and it was also held that the Law Merchant of the United States had come into force.[9] While Louisiana was still governed as a Federal Territory, the writ of *habeas corpus* and trial by jury were established, though rules not inconsistent with these innovations were expressly left in existence. In 1805 the Territorial Legislature adopted both Edward Livingston's Code of Practice (which embodied some common law rules) to supersede the ancient Spanish system of procedure and a Crimes Act

[7] Dart, *Civil Code of Louisiana. Revision of 1870,* Preface, iii.
[8] Ireland, *op. cit.,* p. 586 (= Et. Lambert, p. 95); cf. Wigmore, *op. cit.,* p. 2.
[9] Wigmore, *op. cit.,* p. 14.

which enumerated the more serious crimes and then provided generally that the method of trial, rules of evidence, *etc.*, should be in accordance with the common law of England—yes, England!

The first American Governor, William Claiborne, would have gone much farther if he could, but he met with solid opposition from the Créole population. The Créoles had not been consulted about their transference to the United States, and they resented the intrusion of the brash and democratic Americans in large numbers. As regards the common law, it was unintelligible to them both in language and in the manner of its administration, and above all they feared for the institution of slavery on which their fortunes depended.[10] The common law, they knew, was hostile to slavery and the new government had abolished the foreign slave trade almost as soon as it came into power.

The trial of strength came in 1806 when Claiborne vetoed a bill passed by both Houses of the Territorial Legislature which, pending the enactment of a code, attempted to define the sources of law that might be quoted in Louisiana. The list of these sources makes strange reading. It includes in the first place 'The Roman civil code, as being the foundation of the Spanish law by which this country was governed before its cession to France and to the United States, which is composed of the Institutes, Digest and Code of the Emperor Justinian, aided by the authority of the commentators of the civil law and particularly of Domat' . . . and secondly of various Spanish compilations, including again the *Siete Partidas,* and finally in matters of commerce the *Ordinance of Bilbao,* supplemented by Beawes' *Lex Mercatoria* and a few other treatises.[11] Several of these interesting works were not available in Louisiana at the time, and only a few people could have read some of them if they had been procured. It was thus not easy for Claiborne's opponents to persevere with their project, and they turned to other quarters for material with which to stem the rising tide of common law. For their purpose the French codes presented themselves as the most obviously suitable and, in 1808, the

[10] See Jefferson's letter of 1807, quoted by Mitchell Franklin, 'The Place of Thomas Jefferson in the Expulsion of Spanish Medieval Law from Louisiana' (1942) 16 *Tulane Law Review,* pp. 319–338 at p. 335.

[11] Cited in full, Franklin, *op. cit.*, p. 323.

Legislature adopted a Digest of civil law, based mainly on one of the drafts for the *Code Napoléon*, but containing also some Spanish elements.[12] It seems paradoxical that the slave-holding Louisianians should have resorted to the liberal products of the French Revolution, but, as Professor Franklin points out, in the France of Napoleon's time there was strong support for colonial slavery, and the Empress Josephine was herself a Créole. In any case, slavery was very carefully safeguarded in the Louisiana version of the French legislation.[13] The Créoles also fortified their position by securing the insertion in the Constitution of 1812 of a clause which prohibited the adoption of any legal system by general reference—a provision clearly aimed against any attempt to enact the common law as such. A little later, in 1817, the Supreme Court of the State gave great encouragement to the use of the old sources by deciding that the Digest of 1808 must not be taken to have repealed previous rules except in so far as they were definitely inconsistent with it.[14] Similar decisions kept the old authorities alive even after the revised Civil Code of 1825,[15] and so multifarious was the research thus forced upon practitioners that Wigmore speaks of these early years as 'the Augustan age of the bar of Louisiana'.[16] The Legislature encouraged translation of the ancient works,[17] while the courts, on the other hand, held that where common law terms had been introduced into the legal terminology of the State they should be 'considered rather as a translation of the names formerly used than as emanating from English jurisprudence', and in accord-

[12] It is sometimes said that this draft, commonly called the '*Projet de l'An VIII*', was used because no copy of the completed code was available, but in spite of the war conditions this is difficult to believe, and there is some evidence that material from the *C.Nap.* not in the *projet* was used, see C. G. Davidson, 'Stare decisis in Louisiana' (1932) 7 *Tulane Law Review*, pp. 100–118 at p. 101. The *projet* was probably chosen deliberately because it contained much theoretical and didactic material that was cut out in the *C.Nap.* itself, and this material appealed to the draftsmen both because theoretical literature was scarce in their country at the time and in general. Livingston, as an ardent disciple of Bentham, was insistent that laws should be explained.

[13] Franklin, *op. cit.*, p. 328, cf. 'The Eighteenth Brumaire in Louisiana: Talleyrand and the Spanish Legal System of 1806' (1942) 16 *Tulane Law Review*, pp. 514–561 at p. 559.

[14] *Cottin* v. *Cottin*, 5 Martin 93. It is interesting that Edward Livingston was counsel for the unsuccessful appellant.

[15] Ireland, *op. cit.*, p. 589 (= Et. Lambert, II, 97) citing *Flower* v. *Griffith*, 6 Mart. (N.S.) 89 (La. 1827).

[16] *Op. cit.*, p. 9.

[17] Cf. note 6, p. 3, above on the *Siete Partidas*.

ance with this view regarded *mandamus* as the translation of *incitativo*.[18]

In the first half of the nineteenth century it may thus be said that on the whole the civilian party among the lawyers had the upper hand. But from the first, as we have seen, the position of the civil law had been menaced, and the influx both of lawyers trained in the common law and of legislation on Anglo-American lines continued. Slavery disappeared after the Civil War, and a revised edition of the Code to meet the new conditions was enacted in 1870. English was not only the official language, as it had been since the Purchase, but became more and more the language of the community generally, and the antagonisms between the two classes of the population tended to diminish. Above all the habit of citing cases rapidly established itself. The first volume of Martin's Reports was published in 1811, and Judge Martin himself, in 1839, in effect admitted that precedents were a source of law when he agreed that more than one was necessary before the law could be regarded as settled.[19] The attitude of mind which regarded *mandamus* as a translation from the Spanish did not survive,[20] and the courts ceased to have any hesitation about using Anglo-American authorities to elucidate common law rules that had been received. By the end of the nineteenth century the civil law had certainly lost much ground, and it continued to do so in the early part of the twentieth. But what is the position now?

In some ways common law influence seems to be still increasing. The social problems that arise are similar to those in other States, and similar statutes are passed to solve them. The Anglo-American institution of the trust has recently been adopted in greater measure than before. Charitable trusts were authorised as long ago as 1882, and in 1920 a rather inadequate measure

[18] *Agnes* v. *Judice*, 3 Martin 182 (1813). It was also suggested that *certiorari* and prohibition represented *evocacion* and *inhibicion* respectively. The court was clearly anxious to avoid some of the English technicalities, although a majority of the judges had been trained in the common law, see McMahon, *op. cit.*, p. 44. Cf. *Abat* v. *Whitman*, 7 Martin (N.S.) 162 (1828) (though it was said that different considerations would apply to such institutions as jury trial and the writ of *habeas corpus*, previously unknown to the State's laws); and *State ex rel. Morgan's L. & T.R.R. and S.S. Co.* v. *Judge*, 33 La. Ann. 954 (1881).

[19] Ireland, *op. cit.*, p. 591 (= Et. Lambert, II, 99) citing *Smith* v. *Smith*, 13 La. 441 (1839).

[20] John H. Tucker, 'Source Books of Louisiana II' (1932) 7 *Tulane Law Review*, pp. 82–95 at p. 86; cf. McMahon, *op. cit.*, p. 51.

was passed, the chief motive of which seems to have been the banks' desire not to miss the profitable business done by trustee departments in other States.[21] A more comprehensive Act was that of 1938, and as recently as 1952 another, which could only come into effect after a constitutional amendment, extended the possibilities still farther.[22] Trusts have clearly come to stay, though they are subject to some restrictions unknown in common law countries, and in some cases it is difficult to reconcile them with still unrepealed sections of the Civil Code, which, like that of Napoleon, is hostile to *fideicommissa*.[23]

Nor is the language difficulty any less serious than when Mr. Ireland wrote. In a lecture by Dean Hebert of the Louisiana State University Law School that I had the good fortune to hear, he deplored that too few students knew either French or Spanish, and Mr. Ireland's remarks about the Bar seemed to be confirmed by such inquiries as I could make among practitioners. Two of them, both in very good practice, agreed that very few lawyers could read French, though one of them (significantly perhaps the older) said that he himself when he had a difficult problem often consulted French commentators in the court library—he did not have their works in his office. I also asked the 'law clerk' of one of the judges who sometimes quotes foreign authorities in his opinions whether any of the references were supplied by counsel. He seemed almost amused at the suggestion; the judge, he said, found them for himself.

On the other hand, the fact remains that such citations are made. In an elaborate opinion on the subject of collation handed down last year, Hawthorne, J., of the Supreme Court, quoted from Domat's *Civil Law* in Strahan's translation,[24] from Brissaud's *History of French Private Law* (also in translation), and from some untranslated French books of which the most recent was the 1937 edition of Planiol and Ripert's *Manuel*

[21] Nabors, (1934) 8 *Tulane Law Review*, pp. 522–541 at p. 522.

[22] La. Act 208 of 1952 proposed an amendment to the Constitution which would permit the Legislature to extend the duration of trusts beyond the ten-year limit and legalise pension trusts. This was done by La. Act 209 of 1952, which became effective when the constitutional amendment was adopted at the General Election on November 4, 1952. See L. Oppenheim, 'Limitations and Uses of Louisiana Trusts' (1952) 27 *Tulane Law Review*, pp. 41–58 at p. 41, note 2.

[23] La. Civil Code, Art. 1520; *C.Nap.*, Art. 896.

[24] For Domat, cf. note 11, p. 5, above.

élémentaire. From this last he cited a case in the *Cour de Cassation*.[25]

Another quite important conservative factor lies in the sentimental attachment with which the Code is regarded as something traditional and peculiar to the State. Nor is this feeling confined to academic lawyers, or indeed to lawyers at all. One practitioner with whom I talked expressed his general preference for civilian as against common law methods, and when I taxed him with being sentimental about the matter admitted, rather reluctantly, that perhaps he was. More significant, however, is the attitude of the Legislature as revealed in a remark made by Mrs. Harriet S. Daggett in one of her learned contributions to West's *Louisiana Statutes Annotated*.[26] The reverence of the lawgiving body for the Code is, she says, so great that statutes often repeal one or more articles *sub silentio* rather than expressly, and she adds that it is 'harder to amend the Code in the Legislature than to pass a resolution contemplating an amendment to the State Constitution'.

An element which makes, not indeed for conservatism, but against any insufficiently considered imitation of other States, is the Louisiana State Law Institute. This is an extremely active body, set up under a statute of 1938, having as its first duty 'to consider needed improvements in both substantive and adjective law, and make recommendations concerning the same to the Legislature'.[27] Under this head it has already a number of achievements to its credit, chief of which are the Criminal Code of 1942 and the Revised Statutes enacted in 1950. It has now also nearly completed a draft revision of the Code of Practice. Criminal law has little to do with the civilian inheritance of the State, and the draft Practice Code is an amalgamation of Anglo-American and Continental principles. But the next task to be taken in hand is the revision of the Civil Code itself, and, so far as I can tell, there is no likelihood of its being

[25] *Succession of Gomez*, Supreme Court of Louisiana, July 3, 1953, 223 La. 859; 67 So 2nd 156. Cf. also *Carpenter* v. *Metropolitan Insurance Co.*, 167 So 223 (Ct. of App. La. 1936), where McCaleb, J., treating of *res iudicata* refers to the discussion of French authorities in the leading case of *State* v. *American Sugar Refining Co.*, 108 La. 603; 32 So. 965. In *Smith* v. *Sun Oil Co., Inc.*, La. 907, 116 So. 379 (1928) at pp. 381–384, where extracts from several French commentators are given, it is stated that the translations were provided by learned counsel.

[26] Revised Statutes, Vol. 3. Tit. 9 *Civil Code Ancillaries*, at p. 3.

[27] *Handbook of the Institute* (1952), p. 8.

revised in a manner inconsistent with its origin. The Institute clearly fosters a considerable pride in the legal history of the State; it will use a compiled edition of previous Louisiana codes already issued under its auspices,[28] and it is in touch with the French committee on the revision of the *Code Civil*.[29]

The real tug-of-war, however, concerns not the amendment of the Code, but the way in which, whether amended or not, it should be handled by the courts. Nor does it help much towards understanding the real issues involved to ask the simple question whether the rule of *stare decisis* applies or not. A common lawyer might certainly read Louisiana reports for a long time before he came across anything that struck him as unfamiliar in the citation of decided cases. He might even find such old friends as the distinction between *ratio decidendi* and *obiter dictum* and the differentiation between decisions settling title to property and others.[30] Nor will he regard it as something quite outside his experience if he finds a judge saying that it requires more than one decision to fix the law, or even overruling previous decisions.[31] We know that in any case the English doctrine of precedent in its strictest form does not prevail in the United States, and such judicial behaviour is compatible both with normal American practice and the French doctrine of *la jurisprudence constante*. A more pertinent question is whether, when the Code is relevant, the court looks first at its words and then permits argument from analogy with its provisions according to the traditional civilian method of interpretation, or whether it is the cases that constitute the real law, while the Code is treated like any other statute to which the normal Anglo-American technique of strict construction is applied. Very closely bound up with this point is the further question, how far, when precedents are cited, they may be from jurisdictions outside the State itself. These questions are more important and more closely related to each other than might appear at first sight to an English lawyer, because other States

[28] *Louisiana Legal Archives,* Vol. 3, Part 1 (1940); Part II (1942).
[29] *Handbook,* p. 24.
[30] C. Girard Davidson, 'Stare decisis in Louisiana' (1932) 7 *Tulane Law Review,* pp. 100–118 at pp. 109 and 115.
[31] Davidson, *op. cit.,* p. 106, quoting Provosty, J., in *Watson* v. *Feibel* (1916) 139 La. 375; 71 So 585, where in accordance with his opinion the Supreme Court overruled three cases and distinguished others in order to get a decision in accordance with the French commentators, several of whom were quoted.

besides Louisiana possess what are called 'civil codes', and it is precisely their example in these matters that the Civilian party in Louisiana fears. For the other codes, unlike that of Louisiana, are based on common law principles, and in four States, California, both Dakotas and Montana, are adaptations of the draft prepared in 1865 by David Dudley Field for New York, but finally rejected there after a heroic struggle. Field's object was, in the main, to reproduce the rules of the common law, but he made some use of civilian methods of arrangement, and he was as fanatical a believer in the virtues of codification as Bentham himself. He did indeed lay down that where the code rules were substantially the same as existing statutes or common law they were to be construed as a continuation thereof,[32] but he did not wish his code to be controlled by existing case law, for he expressly provided as follows: 'The rule of the common law that statutes in derogation thereof are to be strictly construed has no application to this code. The code establishes the law for the State respecting the subjects to which it relates, and its provisions are to be liberally construed with a view to effect its objects and to promote justice',[33]

The Field codes were very useful to States which were either only recently settled or had only recently come within the sphere of the common law, but they were not long administered in the spirit which had animated their author. As long ago as 1884, at the University of California, Judge Pomeroy made the experiment of trying to teach law by the method which he conceived to be that used in the Code countries of Continental Europe. According to this method instruction began with a consideration of the principles to be derived from juristic writing, and there then followed a discussion of related code provisions, only minor attention being given to decisions. This attempt, he says, 'utterly failed', and he found in effect that the only practicable method was first to instruct students in settled common law doctrines by reference to decisions and textbooks, and then to inquire how far these doctrines had been modified by the Civil Code.[34] A year later Judge Pomeroy was no doubt

[32] California Civil Code, s. 5 (Deering ed. 1931).
[33] *Ibid.*, s. 4.
[34] J. N. Pomeroy, 'The True Method of Interpreting the Civil Code' (1884) 3 *West Coast Reporter*, p. 719, quoted from J. O. Muus, 'The Origin of the N. Dakota Civil Code' (1932) 4 *Dakota Law Review*, pp. 103–119.

also expressing the prevailing opinion of the profession in California when he said that in view of its many defects the Code must be interpreted 'as a statement of common law rules, without regard to the literal text, except where a change in the common law has clearly been made'.[35] More recently, in 1932, Mr. Muus reported similar results from a questionnaire sent out to law teachers in North Dakota. Out of twenty-two teachers only two answered 'yes' to the question whether the existence of the Code had caused any departure in method from that usual in common law jurisdictions.[36]

Now it might be thought that, though this was a natural attitude to develop where the Code itself was based on the common law, there was little likelihood of its spreading to a jurisdiction with a code so definitely made on a French model as that of Louisiana. But there is no doubt that it has spread to some extent,[37] and those who deplore it have reason to fear that the movement will go farther. The crux of the matter, I repeat, does not lie in the mere citation of cases, or even in *stare decisis*; it lies in the example of codes which are treated as mere glosses on the common law and the citation of decisions from common law States, even where the Louisiana Civil Code itself applies. For the pressure of these decisions is enormous. It is not only that the number of cases reported every year in the United States is very high; it is rather that the number is so high that the system of precedent would have broken down under its own weight by now if it were not for the American organising genius as displayed by the great law publishing firms. Without greater assistance than we are accustomed to in this country, no one could find his way about the vast mass of Reports, and so most elaborate systems of digests, references and cross-references have been devised, which themselves take up a

[35] Pomeroy, *The Civil Code in California* (1885), p. 48, quoted from C. J. Morrow, 'Louisiana Blueprint: civilian codification and legal method for state and nation' (1943) 17 *Tulane Law Review,* pp. 351–415, 537–574 at p. 403.

[36] J. O. Muus, 'The influence of the Civil Code on the Teaching of the Law at the University of N. Dakota' (1932) 4 *Dakota Law Review,* p. 175.

[37] See especially the weighty (though much controverted) words of F. D. Saunders, *Revised Civil Code of Louisiana* (2nd ed. 1920), Introd., xxviii: 'The Supreme Court has always . . . taken the position that the Civil Code of Louisiana is a statute to be construed and interpreted by the rules which generally govern the construction of statutes, and those rules of interpretation have been sought in the Common Law'.

large number of volumes, and have to be available to every lawyer. So great indeed is the number of decisions thus made available that a lawyer is tempted to go on with his researches, however long it may take him, until he has found, in some State or other, a case which is, or seems to be, on all fours with his own, and preferably was decided in a way that would suit his client. His opponent, of course, does the same.

Now logically, no doubt, the system applies only on the assumption that the law with which you are concerned is of the normal American type, but the system is so convenient that once you have learned it—and even a Louisiana lawyer has to learn it for many of his purposes—the assumption tends to be made even where, historically, it is not justified. 'It is so easy', one eminent practitioner complained to me, 'to look up the *Corpus Juris*'—and I regret to say that he meant '*Secundum*'. In general indeed the methods of publication, almost necessarily, tend to minimise the legal uniqueness of the State. In the National Reporter system, for instance, Louisiana, like the other States, is assigned to a regional group, in this case the 'Southern', and the other States in this group are Mississippi, Alabama and Florida, in none of which the traces of the civil law that remain are of anything like comparable importance.

This system of reporting and rendering easy of access decisions from all States is not the only institution which assumes an essential similarity of law throughout the Union. Equally important is the *Restatement*. That has no pretensions to overrule the law of any State which differs from what its authors take to be the American norm, but it has had great success, partly indeed because it provides an alternative to the often frustrating search through a jungle of precedents—and Louisiana has not escaped its influence. There have even been produced there, as in some other States, '*Annotations*' to the *Restatement*, intended to show how far it agrees with, and how far it differs from the State's own system.[38] These *Annotations* which cover the law of Tort, though produced under the auspices both of the College of Law at Tulane University, and of the State Law Institute, caused some dissatisfaction among the younger teachers in the College, precisely because they seemed to recognise that

[38] *Louisiana Annotations to the Law of Torts*, Prepared by Rufus C. Harris and Robert J. Farley (1941).

the Civil Code of Louisiana was not fundamentally different from those of other States, but, like them, in the main a compendium of common law principles.[39] A casual glance at the contents suggests that the authors were not at all chary of pointing out where Louisiana law rested on a civilian basis different from that of the *Restatement,* but perhaps it was the fact that the volume annotated was that on tort that rankled. For a code which deals with tort on the pattern of the *Code Napoléon* is no doubt especially exposed to the assaults of case law in this respect. Something must fill in the outline provided by the very general paragraphs, and the mass of Anglo-American decisions lying close at hand is likely to have preference over the more remote doctrines of French or other commentators.[40] But in the view of the new school, these assaults should be resisted. 'Has not the common law', asks Mr. Herold, 'reached a point where the vast myriad of precedent has accumulated in such a mass that its application has become a physical labour, and not a mental effort?' and he goes on to decry the method of beginning 'decision as well as investigations of cases with a review of Cyc, Corpus Juris, Ruling Case Law and adjudications of Common Law states, instead of starting at the source, the Civil Code'.[41] Mr. Morrow similarly finds 'a truly distressing aspect' of some decisions in the 'revelation that the court, in traditional common law fashion, feels obliged to reconcile every decision it makes with a great mass of pre-existing jurisprudence'.[42] *Stare decisis,* it is urged, is incongruous in a civil law jurisdiction, and analogical interpretation gives better results than strict construction,

[39] F. F. Stone, 'Tort Doctrine in Louisiana, from what sources does it derive?' (1942) 16 *Tulane Law Review,* pp. 489–513; 'The Aggressor Doctrine' (1947) 21 *ibid.,* pp. 362–371.

[40] Cf. E. F. Surveyor, 'A Comparison of Delictual Responsibility in Law in Countries governed by a Code' (1933) 8 *Tulane Law Review,* p. 53, note 3, where he quotes Saunders' remark that 'It is substantially true . . . to say that the tort law of Louisiana is a body of common law rules and principles having practically no connection with Roman, French or Spanish law'. Ireland, *op. cit.,* p. 596 (= Et. Lambert, 100–101) lists tort among the subjects no longer coming under the civil law. *Contra,* Stone, *op. cit.,* note 39, above; C. J. Morrow, 'An Approach to the Revision of the Louisiana Code' (1949) 23 *Tulane Law Review,* pp. 478–490 at p. 486 says indignantly: 'To read the jurisprudence one would often think that the courts of this State were bound by the Torts Restatement rather than by the Code.

[41] S. L. Herold, 'The French Language and the Louisiana Lawyer' (1931) 5 *Tulane Law Review,* pp. 169–177 at p. 171.

[42] C. J. Morrow, 'Civilian Codification under Judicial Review' (1947) 21 *Tulane Law Review,* pp. 545–558 at p. 553.

especially in the case of legislation which was not drafted with Anglo-American methods in mind.[43] Edward Livingston was no less vehement in his denunciations of judge-made law than his master Bentham, and he upheld the use of analogy.[44] The Code itself directs the judge, in the absence of express law, to turn to equity, natural law, reason and received usages, but it says nothing of decisions.[45]

The new school will certainly have a hard task to make much headway against the surrounding sea of common law, but they have more in their favour than appears at first sight. It is not probable that they can overcome the language difficulty and bring even that part of Louisiana law which rests on the Civil Code back into the family of systems deriving from the *Code Napoléon*; it would be too difficult to make sufficient literature available. But something is being done for translations under the auspices of the State Law Institute, and a version of *Planiol et Ripert* by Judge Henry, formerly of the Mixed Courts at Alexandria, is now nearly complete. More important, however, is the growth, within the State itself, of legal literature, for *la doctrine* is vital to any civilian system. In addition to Tulane, both the other law schools now publish reviews, that of Louisiana State University dating from 1938, that of Loyola University from 1941. All three together already present a very respectable body of work. Above all, however, the strength of the civilian revival lies in the firm educational foundation that has now been laid and in the zeal as well as the abilities of the teachers who support it.

[43] See *e.g.*, H. T. Elder, 'Interpretation of Codes and Statutes by Civil and Common Law Courts, and the Doctrine of Ejusdem generis' (1931) 5 *Tulane Law Review*, pp. 266–271.

[44] See especially Mitchell Franklin, 'Concerning the Historic Importance of Edward Livingston' (1937) 11 *Tulane Law Review*, pp. 163–212 at p. 196.

[45] Art. 21.

THE ROYAL COMMISSION AND THE DEFENCE OF INSANITY

GLANVILLE WILLIAMS

ALTHOUGH the *McNaghten* rules do not fairly cover emotional or conative insanity, as where the act is done under insane impulse, it has become the practice of the Home Secretary to transfer an offender to Broadmoor if advised by medical experts that he is insane. With this use of executive clemency, the technical limitations upon the *McNaghten* rules of exemption have lost most of their importance. The *McNaghten* rules regulate the question whether the jury convict or deliver a special verdict of insanity, but they do not control what happens to the accused. Whatever the verdict of the jury, if the medical view is that he is insane, that view prevails: the accused becomes a Broadmoor patient and is not punished.

In the past, many lawyers have been of opinion that the safety of society demands deterrent punishment to be applied even to the emotionally insane. Executive clemency has gone on behind lawyers' backs, but they have resisted attempts to make the law conform to what happens in practice. Lord Hewart, for example, thought that an insane murderer who does not come within the *McNaghten* rules ought to be hanged if he has sufficient sanity to know why he is being hanged.[1] Lord Goddard, giving evidence before the Royal Commission on Capital Punishment, also inveighed against the present practice of executive clemency.[2] But even legal opinion has been changing of late, and the views of the two Chief Justices can no longer be taken as representative.

In answer to the conservative legal view, it is urged that punishment of the insane is out of place, because insanity tends to neutralise the threat of punishment. Some insane impulses appear to be so powerful that nothing short of mechanical force will prevent them taking effect. Such is the case described by

[1] *Essays and Observations* (1930), p. 233.
[2] *Minutes of Evidence* (*Min. of Ev.*) (1950), pp. 246–247, 257–258. He was supported by Humphreys, J., *ibid.*, p. 266.

Sullivan where a private deliberately and openly shot his sergeant on the shooting range, in the presence of his officer and comrades, for no appreciable reason.[3] Not only are there genuinely irresistible impulses, in the sense that even the threat of immediate punishment will not overcome them, but the disorder of mind may take the form of an exaltation which makes the patient confident that he will escape detention. A system of deterrence presupposes a sound mind; it is not certainly applicable to lunatics. Nor does the principle of deterrence explain why we should hang a lunatic who, like Burton, commits murder as a way out of life for himself. Burton, a youth of 18, was executed in 1863,[4] 'the terrible example having been thought necessary in order to deter others from doing murder out of a morbid desire to indulge in the gratification of being hanged'. The words are Maudsley's.

The gloomy forebodings of the evil that may result from insanity as a general defence have not been borne out by the experience of those States where it has been recognised in law,[5] nor by experience in England since its recognition in executive practice. In particular, a rule exempting the insane would not affect deterrence in those frequent cases where the accused, being insane, firmly believes that he is sane. Again, the objections neglect the deterrent effect of confinement in Broadmoor, though such confinement is not intended as a deterrent. Even in cases of intellectual aberration where insanity would be a defence within the *McNaghten* rules, it is usually not pleaded except where the charge is one of murder with its single punishment. On other charges the accused generally prefers to take his chance of normal punishment than sacrifice his liberty for an indeterminate period by pleading insanity. This does not suggest that the present machinery for dealing with criminal lunatics is lacking in deterrent quality.[6]

It must be confessed that these replies do not go the whole

[3] Sullivan, *Crime and Insanity* (1924), p. 210; the case is very similar to *Dixon* (1869) 11 Cox 341. Cf. *Stokes* (1848) 3 C. & K. 185; *Haynes* (1859) 1 F. & F. 666, where the accused was convicted of a motiveless murder performed before witnesses.

[4] 3 F. & F. 772.

[5] Glueck, *Mental Disorder and the Criminal Law* (1925), p. 238; Weihofen, *Insanity as a Defence in the Criminal Law* (1933), p. 61.

[6] But the fear of Broadmoor would be greatly diminished if it becomes more generally possible to cure insanity, for that would mean speedy release.

way. So long as the argument rests purely on the plane of deterrent punishment it is difficult to resist the conclusion that insane impulse should be no defence. Taking the insane as a class, there can be no certainty whether the threat of punishment may not control or modify conduct. The stronger the temptation to offend, the greater must be the punishment if it is to stand any chance of counterbalancing the temptation. Even if the threat of Broadmoor is a deterrent, the threat of hanging is usually a greater one. But is this the only consideration? In practice, criminal punishment is not governed exclusively by the deterrent theory; the deterrent theory is modified by a notion of justice; some value is attached to the personality of the killer himself; and it is generally felt to be unjust (or inhumane) to punish one whose powers of control are seriously weakened by mental disease. An insane person, said Maudsley, has 'the right to claim the privilege of his disease, and the compassion which attaches to affliction in civilised lands'.[7] Allowing for a development in the concept of insanity, this is little more than had been admitted by Coke, who declared: *Furiosus solo furore punitur*[8] —he is punished by his madness alone.

'Hamlet is of the faction that is wrong'd;
His madness is poor Hamlet's enemy'.

Even those lawyers who think that insane impulse should not be a legal defence now generally concede the propriety of executive intervention to avert punishment.

It has been argued that the notion of justice works somewhat capriciously in exempting the insane while not exempting the sane person who becomes a habitual criminal through adverse upbringing and surroundings. Whereas the one is chiefly the product of heredity, the other is chiefly the product of environment. If the emotionally insane person is exempted because he is not easily intimidable by the law, the habitual criminal should be exempted on the same ground. An argument of this sort does not prove that the prevailing sentiment in favour of the insane is wrong; it may be taken as showing merely that more consideration should be given to the case of the habitual criminal. We are slowly learning to treat habitual serious criminality as calling for preventive detention rather than punishment.

[7] *Responsibility in Mental Disease* (1874), p. 126.
[8] Co.Lit. 247b.

PROPOSALS TO WIDEN THE LEGAL EXEMPTION FOR INSANITY

It may be said, then, that the general acceptance of the Home Secretary's discretion has settled the issue that emotional or conative insanity, when clearly made out, may properly exempt from punishment. The live issue is whether the power to exempt should be transferred to the court. Such a transfer would get rid of the farce of pronouncing the capital sentence when it is not intended to execute it,[9] and would ensure that the decision as to treatment is taken in (or at least reported to) open court. Lord Hewart's objection that a jury is not competent to pass upon emotional insanity, even if valid, would disappear if the question of insanity were entrusted to experts reporting to the court.

As a drafting matter, it would be possible to widen the present legal exemption for insanity in either of two main ways. There could be added to the existing *McNaghten* rules an exemption for insane or irresistible impulse or something of the same kind. Or the *McNaghten* rules could be abolished, and insanity *per se* left as a ground of exemption. Both these solutions have their advocates. The Atkin Committee in 1923 recommended the adoption of the defence of insane impulse, defining it as 'an impulse which the prisoner was by mental disease in substance deprived of any power to resist'.[10] But in evidence before the Atkin Committee, the Royal Medico-Psychological Association had proposed that the question should be the general one of insanity; and the case for this was powerfully argued by Sullivan,[11] who pointed out that even if the Atkin Committee's recommendations were put into force, it would still involve the retention of the restrictive attitude towards delusional insanity. In a recent survey of opinion among Canadian psychiatrists,[12] there was a large majority against the *McNaghten* rules as they

[9] In *R.* v. *Loan, The Times,* June 5, 1953, Jones, J., sentencing a mother who had killed her son while insane (in circumstances not falling within the *McNaghten* rules) abandoned the usual grim formula because of the certainty of reprieve, and merely passed 'sentence of death'. In this he anticipated the views of the Royal Commission: Cmd. 8932 (1953), para. 693.

[10] Cmd. 2005.

[11] *Op. cit.,* p. 239ff.; the discussion deserves to be read *in extenso.* Cf. Forster, 'The Relation of Mental Disease to Criminal Responsibility' (1924) 41 *South African Law Journal,* p. 445 at p. 458.

[12] Stevenson, 'Insanity as a Defence for Crime: Analysis of Replies', 25 *Canadian B.R.,* p. 871; cf. Stevenson, 'Insanity as a Criminal Defence', *ibid.,* p. 731 at p. 733.

stand, but at the same time eighty-four psychiatrists out of the eighty-six opposed the suggestion that 'irresistible impulse' should be added as a defence. The suggestion that found favour (sixty-three out of eighty-four) was that the presence of an actual psychosis or actual mental deficiency should be the criterion for establishing legal irresponsibility. Some British psychiatrists have expressed a similar opinion.[13] On the other hand the British Medical Association, giving evidence before the Royal Commission on Capital Punishment in 1950, favoured the retention of the *McNaghten* rules with the addition of a provision for insane impulse in the wide sense of the term: a person should be exempt where he was labouring, as a result of disease of the mind, under a disorder of emotion such that he did not possess sufficient power to prevent himself from doing the act.[14] Oddly enough, the Royal Medico-Psychological Association, which before the Atkin Committee had advocated that irresponsibility should be made coextensive with insanity, now resiled from this position to such an extent that they expressed complete satisfaction with the way the *McNaghten* rules were worked in practice.[15] The Association seems, however, to have been misinformed as to judicial practice; a witness for the Association confessed that he thought that insane impulse was covered by the rules.[16]

Yet another form of wording which has been suggested may be mentioned here because it raises a question of some philosophical interest. Giving evidence before the Royal Commission, Sir David Henderson proposed that the question for the jury should be: 'Was he, on the basis of the medical evidence that has been put before you, wholly irresponsible or unaccountable for his actions at the time the crime was committed?'[17] This test, which finds several advocates in the medical profession, is unsatisfactory, because 'responsibility' is hardly more than a name that we choose to attach to those whom we regard as within a given ethical or legal system. A dog is not 'responsible';

[13] Henderson and Gillespie, *A Text-Book of Psychiatry* (7th ed. 1950), p. 715.
[14] *Min. of Ev.* (1950), p. 317; cf. *ibid.*, pp. 547, 551.
[15] *Ibid.*, p. 476.
[16] *Ibid.*, p. 485. Cf. Jerome Hall, *General Principles of the Criminal Law* (1947), p. 505 *et seq.*, arguing that insane impulse is always coupled with intellectual disorder, so that it could be covered by a liberal reading of the *McNaghten* rules. The fact is that English judges, at any rate, have long refused to adopt this liberal reading.
[17] *Min. of Ev.* (1950), p. 469.

a sane adult is 'responsible'; a baby is not 'responsible', but at some age (undefined, except in law) he grows into 'responsibility'. 'Responsibility' is a simple-seeming word for an undefined degree of intellectual development, an undefined degree of self-control and emotional maturity, and perhaps some knowledge either of 'right and wrong' in the abstract or of accepted moral standards. With so much room for differences of opinion the term becomes almost empty of fixed content, except as an assertion that an individual ought to follow moral or legal rules, as the case may be, and that if he breaks them we may regard him as immoral or as a proper subject of punishment. Thus, in the absence of clear definition, the term belongs not to the world of scientific fact but to the world of moral imperatives. It is not a question on which medical evidence can be fruitful.

A feeling of responsibility in the sense of a feeling of moral obligation and a sense of guilt is indeed a psychological fact. But this is irrelevant to legal discussions; we do not ask whether the lunatic in the dock feels guilt or remorse, except as this may bear on the question of knowledge of wrong. Even if he feels responsible, that is not necessarily a reason for punishing him. It is a characteristic of the depressive phase of the manic-depressive psychoses that the patient not only accepts responsibility for the crime but accepts responsibility also for sadness and misfortune that has nothing to do with his acts. 'He feels that he has committed unforgivable sins, that he is worthless, a burden on the community or at least on his family, and is ready to welcome death in any form. Yet, this is not recognised by him as mental disorder'.[18] Knowledge of wrong of this sort should not be germane to the question of punishment.

In its Report the Royal Commission advised, with the sole dissent of the representative of the English Bar, that the legal exemption for insanity should be extended; but the Commission split on the drafting question. Most members, seven in number, preferred to abrogate the *McNaghten* rules and to leave the jury to determine whether at the time of the act the accused was suffering from disease of the mind (or mental deficiency) to such

[18] Dr. T. Christie, 'The Manic-Depressive Psychoses, in Relation to the Crime of Murder, with some Medico-Legal Points', 10 *Medico-Legal Review*, p. 10 at p. 13.

a degree that he ought not to be held responsible.[19] A minority of three preferred to retain the *McNaghten* rules but to add an exemption where the accused was by reason of disease of the mind or mental deficiency incapable of preventing himself from committing the act.[20] The majority were prepared to support this minority proposal if their own preference were rejected.

The minority proposal (to discuss that first) is not worded in terms of 'insane impulse' or 'irresistible impulse', for the reason that this phrase misleadingly suggests that 'where a crime is committed as a result of emotional disorder due to insanity, it must have been suddenly and impulsively committed after a sharp internal conflict'. The Commission wished to extend the exemption to afflictions like melancholia, where the sufferer experiences a change of mood which alters his whole existence; the criminal act may then 'be coolly and carefully prepared; yet it is still the act of a madman'.[21]

The principal objection to the minority recommendation is that on a narrow view it leaves unremedied the deficiencies of the *McNaghten* rules in respect of insane delusions. Take a madman who, like Hadfield,[22] murders in pursuance of what he conceives to be a divine command. He knows what he is doing, and may (like Hadfield) know that it is illegal; so that on a strict interpretation of the *McNaghten* rules he could not be exempted from conviction. Can it be said, in terms of the minority proposal, that as a result of disease of the mind he is incapable of preventing himself from committing the deed? If so, is it not true of all lunatics who commit crimes that their insanity renders them incapable of acting otherwise? But if the exemption is extended as widely as this, it would be clearer and more straightforward to word the rule as the majority propose, in effect making insanity coextensive with irresponsibility.

An additional objection to any rule based on the idea of irresistible impulse is that it lands in the metaphysical quagmire of determinism. On the determinist philosophy, no one has power to resist any desire in the particular circumstances in which he yields to that desire. It is only on the philosophy of indeterminism that the test proposed by the minority is at all

[19] Cmd. 8932 (1953), para. 333.
[20] *Ibid.*, paras. 317, 333, and p. 285 *et seq.*
[21] *Ibid.*, para. 314.
[22] (1800) 27 St.Tr. 1281.

intelligible. This difficulty might be evaded by speaking not of ability to act otherwise in the particular circumstances but of general capacity for controlling conduct. In other words, it might be asked whether the accused, being insane, differs markedly from the normal in his power of self-control. As Glueck says, 'the question of metaphysical freedom is unanswerable; the question of deviation from normal capacity is one for the psychiatric expert'.[23] Yet one comes back to the point that a question worded in these terms would hardly differ in meaning from one worded in terms of insanity *simpliciter,* and the latter would seem to involve less risk of misunderstanding.

Turning now to the proposal favoured by the majority, which in effect makes irresponsibility coextensive with insanity, the usual objection to this is the difficulty of defining insanity. There are imperceptible gradations between insanity and lesser mental abnormality—between, for example, melancholia and mild anxiety; between psychosis and neurosis. The usual distinction made between psychosis, or insanity, and neurosis, is that the psychoses deprive the patient of contact with reality. Dr. T. A. Ross puts it thus:

'The psychotic lives, in so far as he is a psychotic, in a world of fantasy; the neurotic lives in the real world; its difficulties are greater by far for him than they are for normal people, but they are the same difficulties which all of us have. The difficulties of the psychotic arise from the fact that he is living in quite another world, in one which is not subject to the ordinary physical laws'.[24]

This is over-simplified because it is a contrast between extremes, and leaves unresolved the difficulty of classification in marginal cases. One medical view would say that the distinction, being entirely one of the degree of the illness, is administrative or legal rather than clinical or scientific; the psychotic patient is one who cannot be relied upon to co-operate in treatment, and who may therefore require special arrangements for care and protection, such as certification.[25]

This difficulty of severing sanity from insanity, though grave,

[23] S. S. Glueck, 'Ethics, Psychology and the Criminal Responsibility of the Insane', 14 J.Cr.L. & Cr. 239.
[24] Ross, *The Common Neuroses,* quoted by Stafford-Clark, *Psychiatry Today* (Pelican Books, 1952), p. 92.
[25] Stafford-Clark, *loc. cit.*

is not conclusive. In the first place, the artificiality of drawing a line, where there is a valid distinction between extremes, is never a conclusive objection to a legal rule, for every rule has to face it. In the second place, the law already distinguishes between sanity and insanity. Thus (*a*) mistake of law is generally no defence to a sane person, but is to an insane person under the *McNaghten* rules; (*b*) mistake of fact is an absolute defence to a sane person, but for a deranged person it results in a verdict of insanity[26]; (*c*) insanity has to be determined in exercising executive discretion, and in the certification of lunatics. In the third place, the issue of insanity is hardly more obscure than the question whether the accused could distinquish right from wrong.[27] The *McNaghten* formula here adds to the difficulty of deciding the case rather than assisting it.

It will have been noticed that the majority recommendation avoids the term 'insanity'; instead it speaks of 'disease of the mind or mental deficiency', requiring this to exist to such a degree that the accused 'ought not to be held responsible'. There is perhaps some slight danger in the formula, for it may encourage a reactionary jury to say that although the man is undoubtedly insane, he ought to be held responsible. I am not myself convinced that a simple question in terms of insanity or mental deficiency would not be better. But this is perhaps a matter of taste, and it seems to me quite clear that the majority recommendation would effect a great improvement on the present law.

PROPOSALS TO REPLACE THE JURY BY MEDICAL EXPERTS

There is one question which the Royal Commission did not discuss, namely whether we should not transfer the issue of

[26] But there is much more difficulty in deciding the issue of insanity in cases of insane impulse than in cases of insane delusion. In insane delusion (cognitive insanity) the mere existence of the delusion is usually satisfactory proof of insanity. Sane persons do not have delusions, unless of course they are drunk, or asleep, or unless their senses are deceived in some common way, as by an optical illusion or by mistaking one article for something else that resembles it; and if a sane person is deceived in this way he can generally be readily brought to acknowledge his error. On the other hand in volitional insanity the mere fact that the accused gave way to an impulse is no evidence of insanity, because giving way to an impulse is true of all criminals.

[27] Dr. H. T. P. Young, Director of Prison Medical Services, said before the Royal Commission that it is easier for a medical witness to say that a man is insane than that he falls within the other legal rules for exemption (*Min. of Ev.* (1949), p. 56).

insanity from the jury, swayed by partisan witnesses, to impartial experts. Those who, in evidence before the Commission, supported the *McNaghten* rules in greater or lesser degree, generally did so because they believed them to afford simple tests for a jury to apply.[28] The majority of the Commission thought that it would not be beyond the capacity of juries to apply the test that they put forward, for 'the issue is not a purely medical one, but is essentially an ethical question, in which both medicine and the law are closely involved'.[29]

Notwithstanding this opinion, it is worth looking at some of the criticisms of the jury. Insanity is usually pleaded in charges of murder, and the victim is often a woman or a child, or the crime is accompanied by circumstances of particular horror. The emotional reaction of the jury is occasionally (by no means always) to reject the defence of insanity even where the medical evidence for it is overwhelming.[30] As the Commission itself said, 'whatever the law may be, juries are likely on occasion to be more strongly influenced by the nature and circumstances of the murder than by the medical evidence about the state of mind of the accused'.[31] Whether a person is held responsible or not tends to depend on whether he stirs the sympathy of the jury or their aversion, subject only to the very limited control exercised by the Court of Criminal Appeal. A peculiar feature of psychiatric evidence is that it is directed not to the external facts of the case but to facts relevant to the accused's moral responsibility, and it is therefore in its very nature apt to create an emotional disturbance in the minds of the jury. Dr. Stafford-Clark says: 'A certain amount of psychiatric evidence about the state of mind of people who steal or who commit violent crime or display sexual perversions, conflicts with the immensely strong but largely subconscious human impulse to punish in others the tendencies which we deny or repress in ourselves. It is for this reason that such evidence all too frequently excites powerful feelings of criticism and hostility in those to whom it is presented'.[32]

Although, as the Royal Commission said, the question how far

[28] Cmd. 8932, para. 274.
[29] *Ibid.*, para. 327.
[30] See, *e.g.*, Taylor, *Medical Jurisprudence*, 9th ed., Vol. 1, p. 827.
[31] Cmd. 8932, para. 242.
[32] *Psychiatry Today* (Pelican Books, 1952), p. 269.

the insane should be held legally accountable is predominantly an ethical matter, it is not one that is well left for determination in individual cases by a body aptly described in *The Times* as 'a random collection of twelve people brought together for one occasion only'. As a community we must make up our minds on the general ethical question whether insanity *per se* should exempt; and if we think it should, we must find the best tribunal for deciding the question of insanity. Quite apart from their frequent emotional bias, jurors lack the training to decide one of the most difficult of all scientific problems. Jurors are not permitted to decide technical matters of law (even foreign law), nor matters of maritime practice; and there would seem to be good reason for removing from them also the question of insanity. To entrust it to a jury would seem to be as absurd as asking a jury to decide whether a man is tubercular: more so, because whereas in diseases of the body the jury have a proper sense of humility, and will defer to expert opinion, in mental afflictions they sometimes suppose that they know better than the experts. Jurymen also suffer from popular misconceptions concerning insanity; they sometimes suppose that insanity, if it exists, must be manifested in behaviour in the witness box, so that if a person can talk intelligently and calmly he must be sane. Various other inconclusive criteria are employed, not only by juries but by appellate judges—'He must have been sane because he remembered what he had done and showed remorse; he must have been sane because he had an apparently sane motive'. With the advance of scientific knowledge, it becomes more and more difficult to explain the medical issues to the jury. Thus Dr. Denis Hill, in evidence before the Royal Commission, said that he had failed to explain to a jury the significance of certain E.E.G. traces after an hour and a quarter in the box.[33]

The judge, by whom the jury are guided, is not in much better case. Before his elevation to the bench he may have been a barrister specialising in commercial matters; he may not have handled criminal cases for years, and may have no understanding of the problem of insanity. Some judges make a parade of their ignorance of medical thought on this subject.

A particularly unfavourable instance of the attitude of a jury is the trial of Ronald True in 1922. Eleven doctors who saw

[33] *Min. of Ev.* (1950), p. 313.

True after his arrest considered him insane or a moral imbecile or both, and no doctor could be found to give rebutting evidence. Notwithstanding the unanimous medical evidence and a direction from the judge favourable to True, the jury convicted. Perhaps the jury were influenced by the fact that True robbed as well as killed, taking as a practical test of insanity the absence of intelligible motive. Larceny, on this view, is always an intelligible motive for crime, and hence is inconsistent with insanity. Dr. Fairfield's comment is worth repeating:

'There is much good sense in the popular judgment, but it is inadequate to meet fairly all varieties of mental disorder. In order to judge whether normal motive is necessarily a proof of sanity, we have to compare the amount of pleasure enjoyed with the magnitude, the certainty and the proximity of the evil that is incurred. A gigantic danger risked for the sake of a small gain which might have been attained by other means, may be as strong evidence of insanity as no motive at all'.[34]

There are other unsatisfactory features of the present mode of trial. Medical evidence for the prosecution is usually given by prison doctors, who are not mental specialists. In case after case these medical officers have come forward and testified that they have detected no sign of insanity in the accused, or have even expressed the positive opinion that he is sane, when other evidence points strongly in the contrary direction. No one who has read the analysis of past prosecutions in Edward Robinson's *Just Murder* (1947) can remain satisfied with the quality of the medical evidence that has frequently been called by the Crown. Unfortunately, prison doctors tend to be believed because it is supposed that they have had long experience of criminals.

It is only fair to add that a prisoner who is really insane may give no evidence of insanity in prison, which with its calm and

[34] Dr. Letitia Fairfield, 'The Criminal Law and the Criminal Insane' (1922) 4 *Journal of Comparative Legislation*, p. 191 at pp. 194–195. For general criticisms of the jury and suggestions for change, see W. A. White, 'Competency of Jurors to pass on Insanity Questions', (1913) 4 J.Cr.L. and Cr., p. 106; 'Report of Committee of American Institute of Criminal Law', (1919) 10 *ibid.*, p. 184 at p. 186; Elliott, 'The Relation of Mental Disease to Criminal Responsibility', (1924) 41 *S.Af.L.J.* 437 at 439; Taylor, *op. cit.*, p. 800; Mannheim, *Criminal Justice and Social Reconstruction* (1946), p. 247; *The Reform of the Law* (1951), p. 162; Tulin, 'The Problem of Mental Disorder in Crime' (1932), 32 *Col. L.R.* 933 at 952–953; 954 *et seq.*; E. B. Hoag, *Crime, Abnormal Minds and the Law* (1923), p. 93 *et seq.*; W. A. White, *Insanity and the Criminal Law* (1923), *passim.*

quiet routine might clear up his insanity. Prison medical officers testified before the Royal Commission that every one charged with a capital crime is examined in the prison hospital, and inquiries are made of his family.[35] On the basis of this evidence the Commission expressed the opinion that 'a full and conscientious investigation' is made. Nevertheless, the Commission made suggestions for improvement, the most important being that an outside psychiatrist of standing should be associated with the prison medical officers in making the examination.[36]

The expert evidence called by the defence may also be sometimes open to criticism, as many observers have pointed out. The defence expert may be selected because he is 'known to entertain unusual and strictly personal views about insanity'.[37] Even where there is no foundation for this suspicion—and generally there is not—'the medical witness is apt to be discredited because it is felt that he is a partisan attempting to make delivery of goods which have been purchased and paid for'.[38] The most honest and competent expert witness is in an embarrassing position if he is compelled to give an answer which he knows to be damaging to the side that calls and pays him.[39] When he is called for the defence in a criminal charge, it is difficult for him to avoid giving an interpretation of the facts which will allow the accused to escape. Since the favourable evidence of experts can thus be bought, the system gives an advantage to the defendant who can afford to pay, while it leaves relatively unprotected the defendant who cannot. Again, the expert in his evidence is limited to generalities; he cannot make his view convincing by detailed accounts of other similar cases in his experience. On top of all this is the charge that the defence expert may have had inadequate opportunity to conduct a proper psychiatric examination.[40]

The mere fact that there is a conflict of evidence tends to work against the accused, not only because the legal burden of

[35] *Min. of Ev.* (1949), p. 191 *et seq.*
[36] Cmd. 8932, para. 422.
[37] Sullivan, *op. cit.*, p. 247. Cf. the forceful words of Oppenheimer, *The Criminal Responsibility of Lunatics* (1909), p. 263 *et seq.*; Glueck, *Mental Disorder and the Criminal Law* (1925), p. 26 *et seq.*
[38] White, *Insanity and the Criminal Law* (1923), p. 3.
[39] White, *op. cit.*, p. 54 *et seq.*
[40] See Stevenson, 'Insanity as a Criminal Defence' (1947) 25 *Canadian B.R.*, p. 733.

proof is said to be on him but because the lay jury will regard itself as set free to decide upon its own impressions.

'They say among themselves, "Well, three doctors have testified on one side and three on the other. We don't know which to believe. Let's throw this whole insanity business out. The man doesn't look very crazy to us, anyhow" '.[41]

If, as the Royal Commission suggests, the quality of the Crown's evidence is improved by calling in an independent psychiatrist, this may reduce the number of instances of disagreement between experts, for under the new system the Crown experts may be more ready to concede the existence of insanity or at least less ready to deny its possibility. But there may still sometimes be disagreement between the two sides, and where they differ it is still the inexpert jury that is to decide between them.

This, then, is the argument for abolishing partisan witnesses altogether and securing a report by the best available experts on the question of insanity. The experts, chosen from a panel, would present their report to the trial court as a reasoned written statement and not as a series of fragmentary replies phrased on the spur of the moment in answer to specific questions. With such a report there would seem to be no justification for leaving the issue of responsibility to the jury, for how could the jury be permitted to ignore the expert inquiry which would be the sole evidence before it? It seems that if the experts have found insanity the jury's function should be confined to deciding whether the *actus reus* was committed. However, it would be better to replace partisan by official experts even if the ultimate issue is still left in the hands of the jury.

There is a considerable body of medico-legal opinion in favour of this change.[42] Recent official inquiries, however, have

[41] J. E. Lind, 'The Cross-Examination of the Alienist', 13 J.Cr.L. & Cr. 228 at 229.

[42] Glueck, *op. cit.*, pp. 35, n. 1, 461 *et seq.*; Stallybrass, *The Modern Approach to Criminal Law* (1945), p. 418; Grünhut, *Penal Reform* (1948), p. 436; Henderson and Gillespie, *op. cit.*, p. 717; Mannheim, *Criminal Justice and Social Reconstruction* (1946), p. 219 *et seq.*; Smith, 'Scientific Proof and Relations of Law and Medicine' (1943) 21 *Canadian B.R.*, p. 707 at p. 715 *et seq.*; Stevenson, (1947) 25 *ibid.*, pp. 735, 875 *et seq.* (giving results of questionnaire); Report on the Criminal Law and Sexual Offences made by the B.M.A. and the Magistrates' Association (1949), p. 20; other authorities in n. 34 above. Some of these wish the expert panel to replace the jury, some do not. Cf. also the Expert Testimony Bill prepared by the Institute of Criminal

pronounced against it. The Atkin Committee, in a report that was conservative on almost all questions except that of insane impulse, rejected the proposal (1) because of the difficulty of finding suitable members to cover all England and Wales, and (2) because 'in no case would it be possible to leave medical testimony to members of the panel and thus prevent an accused person calling evidence of his own doctor'.[43] The reason for the impossibility was not explained. Why should not the accused's own medical adviser, with knowledge of his history, give evidence (not necessarily orally) before the expert panel? The proposal to remove the issue of insanity from the jury to a medical tribunal was again disapproved by the Royal Medico-Psychological Association in its evidence before the Royal Commission on Capital Punishment.[44] In its Report the Commission touched upon the matter,[45] but, smitten with doubts as to its terms of reference, did not pursue it.

In many murder cases the effect of the proposed change would be to have the experts reporting to the court before verdict instead of reporting to the Home Secretary after conviction. This may not appear to be a profound alteration of practice, but it has several points in its favour. Since the medical opinion of the accused's mental condition is now thought to be relevant to his criminal responsibility, it seems obviously right that this opinion should be taken before he is condemned by the jury, not after. At present, it is not brought prominently to public notice in any given case whether the statutory inquiry is held, unless indeed the result is a reprieve. In some recent cases where evidence of insanity was given, the Home Secretary refused a reprieve, announcing merely that he had 'considered all aspects of the case', without indicating whether he had taken expert advice. This secrecy is wholly undesirable. It would be possible for a reactionary Home Secretary to refuse to summon the statutory experts although the facts clearly indicated the need for inquiry: not only is there no means of controlling this, but it is not publicly known whether the Home Secretary has failed

Law and Criminology, reprinted, Keedy, 'Insanity and Criminal Responsibility' (1917) 30 *H.L.R.* 535 at 537; Glueck, *op. cit.*, pp. 450–453, 487; Hammelmann, 'Expert Evidence' (1947) 10 *M.L.R.* 32.

[43] Cmd. 2005, pp. 10–11.

[44] *Min. of Ev.* (1950), p. 476.

[45] Paras. 437–441.

to call for the inquiry or whether the experts have met and refused to recommend a reprieve. In short, the present arrangement for the expert inquiry does not integrate it satisfactorily with the public administration of justice.

An objection that may be brought against the proposed change is that it would deprive the accused of one of his chances of winning a decision of insanity. At present he has two chances: before the jury, and failing them before the statutory experts. Under the proposed system, only the experts could find insanity. If it be granted that a person accused of crime ought not to have the opportunity of being found insane by an inexpert body, the apparent hardship disappears. Also, it is only the issue of irresponsibility that is proposed to be taken from the jury. A jury, while convicting of crime, might still recommend to mercy on the ground of extenuating circumstances, which might include circumstances of 'diminished responsibility'; and if a suggestion of the Royal Commission is accepted, the jury would themselves be able to decide against the death penalty in a murder case.[46] Again, the introduction of an expert decision before or during trial would not affect the power and duty of the Home Secretary to obtain a second expert opinion in respect of new facts or new evidence arising after trial.

CONCLUSION

Without arguing these questions further, it may be briefly submitted that the desirable procedure would be as follows:

(1) There should be a routine psychiatric examination before trial of sexual offenders, persistent lawbreakers, and in all charges of a particularly serious nature. The examination should be by at least two experts, and if they certify that the accused is unfit to plead their opinion should be temporarily conclusive.

(2) If it is notified by either the prosecution or the defence that it is intended to put the accused's sanity in issue on the question of responsibility, the opinion of three experts should be taken (as is now the practice in statutory inquiries after conviction), and the experts should report to the judge on the issue of sanity, which should be removed from the competence of the jury. For the purpose of this report it should be assumed that the accused committed the act charged. If the experts

[46] Cmd. 8932, paras. 552, 567.

report that the accused was insane at the material time, and if the jury then find that he committed the act charged, the jury should return a special verdict, *i.e.,* of insanity. If the experts report that he was sane, the jury must decide whether the accused committed the *actus reus* with the appropriate *mens rea.* It would be possible even at this stage for the jury, disagreeing with the experts, to find that there was no *mens rea* because, *e.g.,* the accused was in a state of insane automatism. The verdict would then have to be one of acquittal; a verdict of insanity would not be possible in the absence of an opinion to that effect by the experts. Such a situation would not be at all likely; and even if the accused is acquitted, there is always the possibility of certifying him in the ordinary way if second thoughts should support the opinion that he is dangerous.

If the experts find themselves unable to report without hearing the evidence, they should sit as assessors with the judge.

The adoption of this procedure would enable the *McNaghten* rules to be done away with, for it would mean that account could be taken of insane delusions and emotional and conative insanity outside the scope of those rules.

THE ROLE OF THE SOLICITOR IN MODERN SOCIETY*

RICHARD C. FITZGERALD

As Sir Hartley Shawcross said just over a year ago, 'The growing complexity of modern life has led to a great mass of legislation, and much of it is inevitably hastily constructed, and much of it is so intricate and so complicated that the state of a great deal of our law today makes a complete mockery of the old theory that it is the business of every subject to know the law, and he must be presumed to do so. The law relating to income tax, for instance, touches all of us in the most painful ways. But its present condition is little short of a scandal, and it is adding insult to injury to expect any layman or many lawyers to understand the intricacies of a system which still requires three appellate stages before finality is reached'.[1]

It is not only the enacted law which is intricate and complicated, but also the common law. Mr. Justice Croom-Johnson in the course of one of his judgments delivered in 1950 said that '. . . the law of England is a living law. It develops, and must develop, according to changes in the social life and social outlook'.[2] That observation has since been powerfully supported by Lord Justice Denning, who has written that the law is uncertain and that it is continually being changed or developed by the judges.[3] That has always been the view of the unsuccessful litigant, but Lord Justice Denning was thinking in wider terms, namely, that if the common law is to retain its place it cannot stand still whilst everything else moves on. That the common law is not standing still is abundantly clear from Lord Justice Denning's own judgments. As he so rightly says, the Welfare State has not only brought with it a social revolution but also a legal revolution no less equal in importance.[4]

* This lecture in the series of Current Legal Problems was also Professor FitzGerald's Inaugural Lecture as Professor of English Law in the University of London.

1 The Rt. Hon. Sir Hartley Shawcross, Q.C., M.P., 'The Service of the Law' (1952) 49 *The Law Society's Gazette*, p. 410.

2 *Best* v. *Samuel Fox & Co., Ltd. & Another* [1950] 2 All E.R. 798 at 800.

3 The Rt. Hon. Sir Alfred Denning, *The Changing Law* (1953), p. vii.

4 *Ibid.*, p. 20.

Not only is it difficult to say what the law is, but it is also difficult to discover where it is, emanating, as it does, from Acts of Parliament, Orders in Council, statutory instruments, ministerial directions and circulars, judicial decisions, and so on.

To these difficulties must be added that caused by another phenomenon of the Welfare State, the growth of departmental tribunals. 'In former times whenever Parliament created new rights and liabilities it almost universally entrusted their determination to the ordinary courts of law. Now it rarely does so. It sets up specialist tribunals to deal with them'.[5] These tribunals operate in such important spheres as social insurance, town and country planning, agriculture, income tax, war pensions, and national service.

In this complex life 'the solicitor has a unique place. His sphere of operations is far wider than that of the judge or barrister: he is brought into close personal touch with those who look to the law for guidance and support, and it is he who brings the word of the lawgiver to the citizen who stands in doubt . . . the solicitor is ideally placed to criticise the law, for he can see at first hand how well or otherwise it serves the cause of order. He stands at the place where all roads meet, for in his work law, in the strict juridical sense, meets and mingles with the general order of everyday social life. . . . Who is better placed than the solicitor to keep the lawgiver informed of the need to amend and extend the law?'[6]

These views of Mr. Seton Pollock, with which I entirely agree, raise important questions, in particular the question whether the profession and its members are adequately fulfilling their obligations to the community. The following survey will, it is hoped, give a reassuring answer.

THE SOLICITOR IN PRIVATE PRACTICE

Dean Roscoe Pound has recently reminded us that there is much more in a profession than a traditionally dignified calling. The term 'profession', he says, refers to a group of men pursuing a learned art as a common calling in the spirit of a public service —no less a public service because it may incidentally be a means

[5] The Rt. Hon. Sir Alfred Denning, *The Changing Law* (1953), p. 30.
[6] Seton Pollock, 'The Go-Between' (1953) 50 *The Law Society's Gazette*, p. 18.

of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose. Gaining a livelihood is incidental, whereas in a business or trade it is the entire purpose.[7] Adopting this concept of a profession, it seems to me that the most important question the individual solicitor has to put to himself is: Which, in the public interest, is the best way for me to use my professional talents and abilities? The right answer will greatly depend on his own personality and inclinations. He may have a real liking for private practice, but his personality may not inspire other persons to place reliance on his abilities. Should that be so, then he should seek some other more appropriate form of public service. But assume that he can with a clear conscience say that his form of public service should be private practice, then it is vital for him to realise at the outset that no longer can one lawyer be a master of all branches of law and that, if he is to do his duty properly by his clients, he must specialise. At one time it was possible for a solicitor to be a general practitioner and be able to give sound advice and guidance. But the law has reached such immense proportions, and requires such detailed knowledge, that I feel no solicitor can now justly hold himself out to the public as being able to give sound advice on any and every point of law and as being fully capable of satisfactorily carrying out every professional duty entrusted to him. If my view is correct, then it means that the day of the 'one-man' firm is ended. The solicitor who has acquired a mastery of, for example, the intricacies of the law of property, the law of planning, and the law relating to taxes and death duties, will find that, in attaining that degree of professional skill and competence, there is no time left to keep abreast of the changes in, say, the divorce law, and the law of negligence.

Two recent cases show how easy it is to give wrong advice or to overlook a basic principle of English law. In the first case an infant, Michael, became entitled in 1941 as tenant in tail in possession of settled property, and he attained the age of 21 years in September, 1944, at which date he was serving overseas in the Royal Air Force. In December, 1944, his mother, as agent for him, consulted solicitors, who, thinking that Michael was the absolute owner of the property, advised that no step need be taken to transfer the property to Michael until he returned to

[7] Roscoe Pound, *The Lawyer from Antiquity to Modern Times* (1953), p. 5.

England. Unfortunately Michael was killed in action in May, 1945, and as he was a bachelor and died intestate, without having disentailed the property, the property passed to one of Michael's uncles instead of forming part of his own estate, as it would have done if it had been his own absolute property. Michael's mother, as his personal representative, claimed damages from the solicitors for negligence and breach of contract. The court found as a fact that the solicitors were negligent, and awarded her, as Michael's personal representative, £6,500 damages.[8] In the other case, the plaintiff bought a house and, eighteen months or so later, because he had obtained employment elsewhere, entered into a contract for the sale of the house. The purchaser's solicitors, on investigating the title to the property, discovered that Colonel Wilkes, the person who sold the house to the plaintiff, had purchased it from the trustees of his, Colonel Wilkes' father's will, of whom he, Colonel Wilkes, was himself one. This was a breach of the rule that a trustee cannot validly purchase the trust property, and consequently the plaintiff's title to the property was defective. The purchaser rescinded the contract, and the plaintiff sued the solicitor who acted for him when he bought the house. The solicitor admitted negligence, and the court assessed the damages at £2,000.[9] If it is possible for mistakes of this kind to be made in matters with which every solicitor must at some time have been familiar, then how much more likely is it that mistakes will be made if a solicitor does work in a branch of law outside the range of his professional skill? As Lord Justice Denning pointed out in *Griffiths* v. *Evans*,[10] the solicitor's profession will suffer more than the individual solicitor if the members of the profession make mistakes which they ought not to make.

It seems to me that modern conditions demand that a solicitor should specialise, and should go into partnership with another solicitor or solicitors who are specialists in other fields. The office should be organised on departmental lines, so that clients' work can be properly distributed. What is important is that there should be the utmost co-operation and consultation between the departments. Team work is of the essence nowadays

[8] *Otter* v. *Church, Adams, Tatham & Co.* [1953] 1 All E.R. 168.
[9] *Pilkington* v. *Wood* [1953] 2 All E.R. 810.
[10] [1953] 2 All E.R. 1364 at 1371.

if professional work is to be done as well as it should be done. Of course, there always has been a certain amount of specialisation by solicitors. Admiralty work, and the work of a parliamentary agent, spring to mind. But what I am suggesting is that as each branch of the law develops so the need for specialisation becomes more pressing. The professional status carries with it more than it has ever done before a duty to serve the public with intelligence and competency, as well as with integrity and unselfishness,[11] and that duty can only be performed by the profession adapting itself to the changing conditions of modern life.

A matter that merits more serious consideration by practising solicitors than it has so far received is the question of the status of the unadmitted managing clerk—of that person who is so valuable a member of every solicitor's staff. Until recent years unadmitted managing clerks were completely unorganised, but now they have efficient organisations—the Solicitors' Managing Clerks' Association, and the United Law Clerks' Society—who look after their interests. Examinations for clerks in the managerial class are conducted by the Law Society in specialised branches of the law, but the number of entrants is disappointingly low. I think the profession owes it to the public to see that their staffs are as highly qualified as possible, and I would like to see solicitors insisting on their clerks passing the examination of the Law Society just referred to in order to reach the status of managing clerk. An unadmitted managing clerk of at least ten years' standing is able to become a solicitor after being articled for three years and, of course, passing the Law Society's examinations for articled clerks. The adoption of my suggestion would enable all argument to be avoided as to whether a person was a managing clerk or not.

In addition to the 'professional skill' aspect there is the economic one. The public does not realise how heavy are the overhead expenses of running a practice. Economic conditions, however, are so serious that solicitors are turning their thoughts to the organisation and management of work in their offices. At the Law Society's Annual Conference held in 1953 the possibility of utilising electronics and mechanical accounting machines was

11 Adopting the language of E. L. Brown, *Lawyers, Law Schools and the Public Service* (1948), p. 19.

explored, and machines which could be adapted to meet the special needs of a solicitor's practice were on show. As some of these machines are only suitable for large concerns, and as some cost anything from £1,000 to £2,000, they will find no place in the small office, especially as the solicitor, with his fixed professional charges, must bear the cost of such mechanical devices himself and cannot, as can a commercial concern, pass the cost on to the consumer. It is quite possible that mechanical devices will be another nail in the coffin of the small firm. A number of firms of solicitors are using machines of this character, and the experiment will no doubt be followed with the greatest interest.

There have been some interesting amalgamations of large and well-known firms of solicitors during recent years, and these may be an indication that private practice is developing on the lines which I regard as inevitable. But what must be avoided, however, is the firm which is too large to have that personal atmosphere which is so important to the client. Practically every matter brought to the office by a client involves a personal and human element, and what the client wants is a friendly atmosphere. He does not want to have the feeling when visiting his solicitor that most people experience when visiting the head office of a big bank or insurance company. The solicitor's office must never give any client the impression that it is a government department or the office of a nationalised industry. That there is something in this point is shown by the experience of Mr. Dudley Perkins, the solicitor who broadcasts regularly under the title 'Can I help you?'. He has had to try to destroy the notion that a solicitor is primarily some kind of court official administering the law. He discovered that the very idea of a solicitor as a friend of his client, sympathising and advising in the client's best interests, is quite foreign to many people.[12] Solicitors must remember, for example, that the Legal Aid Scheme is enabling people to consult solicitors who have never had that privilege or opportunity before.

The question of raising the capital necessary for private practice, if it is not at the solicitor's disposal, is a very difficult one. As the Council of The Law Society has pointed out, the

[12] Dudley Perkins, 'Can I Help You?' (1952) 49 *The Law Society's Gazette*, p. 124.

difficulties are considerably aggravated by the restrictions which are inescapable in private practice. A trader who forms a limited company may obtain fresh capital by an issue of shares or debentures and, within the limits of section 21 of the Finance Act, 1922, accumulate working capital out of income without liability to surtax. A solicitor, on the other hand, is an officer of the Supreme Court with the responsibilities which such a status involves. He may not form a company for the purpose of carrying on his business, he must on no account mix the moneys of his clients with those of his firm, and he must not share his receipts with an unqualified person. His success produces no physical assets and he has no assets which he can pledge as security for borrowed money. The result is that unless a solicitor has private means the whole of his commitments, including his capital requirement, must somehow or other be met out of the net receipts of his business.[13] I was interested to read in *The Times* newspaper a few days ago that doctors under the health service wishing to develop group practice will be eligible to apply for interest-free loans.[14] The proposals submitted by the Council of The Law Society to alleviate the problem of providing capital for professional firms so as to ensure the continuance of an independent legal profession involves the principle that, before arriving at its profits liable to income tax, a firm should be entitled to set aside a proportion of such profits to a Capital Replacement Fund Account. If only for the reason that it would be in the public interest to do so, it is to be hoped that the principle involved will be recognised and made legal.

THE SOLICITOR IN BUSINESS AND OFFICIAL SERVICE

Although private practice is the norm, modern life has made the solicitor indispensable in other spheres. Government departments, local authorities, New Town Development Corporations, nationalised industries, commercial concerns, are all beset by legal problems. There are so many solicitors engaged in these spheres of activity that they really constitute a new class in the legal profession. A solicitor who enters into business employment is entitled to continue taking out a practising certificate and to

[13] *Third Memorandum of the Council of The Law Society to the Royal Commission on the Taxation of Profits and Income.* Annual Report of the Council of The Law Society, 1952–1953, p. 65.

[14] *The Times,* January 29, 1954.

act for his employer as though he were still in private practice and his employer an ordinary client. A solicitor entering employment of this kind has to readjust himself mentally. The 'business outlook' is entirely different from that of private practice. Further, there is a danger the solicitor in business or analogous work must avoid when acquiring the 'business outlook'. 'He must ever be on his guard against relaxing the detached and dispassionate attitude of mind his profession has taught him. . . . A lawyer in business . . . should be able to observe facts with the same detachment as a scientific investigator: if he shares the feelings, or the hopes, of his lay colleagues to the extent of being swayed by them, the appreciation he forms of a situation will be falsified and the advice he gives may well be bad advice'.[15] But, nevertheless, he must remember that he is, in fact, one of a team. To a degree unknown to the solicitor in private practice, solicitors in business and official service find themselves working with engineers, surveyors, doctors, architects, town planners, social workers, and other specialists, and it is important that the team should work smoothly as a whole. Whilst the solicitor in these fields of activity must always work in a spirit of genuine co-operation with all other specialists he must never compromise his status as a member of an independent profession. He must, for example, never join an organisation the membership of which might conflict with his obligations to the community as a solicitor.

That the solicitors' profession will be called upon to undertake still more responsibilities in these spheres cannot be doubted. It is important, therefore, that The Law Society and The Law Society's School of Law and, for that matter, the university law schools, should not fail to keep this obligation of the profession to the community in mind. At the present time law students are prepared for private practice only, and if that state of affairs were to continue the profession would, it is submitted, not be playing its proper part in the running of the Welfare State.

THE LAW SOCIETY

It is commonly thought that The Law Society, which is the central organisation of solicitors, exists solely to protect the professional interests of solicitors. But nothing could be farther from

[15] L. V. Fildes, 'Lawyers in Business', *Progress,* Autumn, 1950.

the truth. The Council of The Law Society is composed of solicitors elected by the members of The Law Society and of solicitors representing the Provincial Law Societies. Every member of the Council devotes considerable time to his duties, all of which are done gratuitously. The Council has organised itself into thirty-three committees, the most important of which, from the point of view of the public, are perhaps the Committees for Articled Clerks; Compensation Fund; Cost of Litigation; Legal Aid; Legal Education; Legal Procedure; Marriage and Divorce; Professional Purposes; Public Relations; Recruitment of Clerks; Salaried Solicitors; Solicitors' Remuneration; and Town and Country Planning. Two of the thirty-three committees are the Joint Committee with the General Council of the Bar, and the Joint Committee with the Solicitors' Managing Clerks' Association. What I am about to say now will, I think, show conclusively that the profession is fully conscious of its responsibilities.

In the public interest, The Law Society, before consenting to a person becoming articled to a practising solicitor with a view to qualifying as a solicitor, requires that person to be interviewed by one of the panels set up by the Council. During the year 1952–1953 the panels interviewed 942 candidates for entry into articles. Applications are sometimes rejected, with the result that the persons affected cannot enter the profession. The Law Society, too, demands a high standard at its examinations. Of the 1,242 candidates at the Final Examinations held in 1952–1953 the percentage of failures was approximately 53 per cent, 657 candidates failing as against 585 passing.

COMPENSATION FUND AND SOLICITORS' ACCOUNT RULES

The public is not as fully aware as it should be that the profession has set up its own Compensation Fund as a guarantee that no client of any solicitor shall suffer any financial loss as a result of the solicitor misapplying his client's money. Every practising solicitor of at least six years' standing[16] has to pay an annual contribution of £5 to the Compensation Fund before he can take out his practising certificate, and in this way, and entirely

[16] A solicitor is not required to make any contribution to the Compensation Fund in respect of the first three practising certificates taken out by him, and he is only required to pay £2 10s. annually in respect of each of his next three practising certificates.

out of their own pockets, as there is no contribution from the State or any one else, solicitors have taken effective steps to safeguard the public. The Compensation Fund Committee meets monthly to consider applications for grants, and every claim admitted up to the end of last year has been paid in full.[17]

Under the Solicitors' Account Rules, 1945, and Solicitors' Trust Account Rules, 1945, a solicitor must keep separate banking accounts for his own money, and for moneys received by him and belonging to his clients, or vested in him as a trustee either solely or jointly with another solicitor-trustee. Every solicitor, when applying for his annual practising certificate, has to declare that he has complied with these Account Rules, a full copy of which is printed on the back of the application form. The application form must be signed by the solicitor personally unless he obtains the express permission of The Law Society to the signing of the form by someone on his behalf, and it is difficult to obtain this permission. The making of a false declaration by a solicitor is a very serious matter, and will lead to his being brought before the Disciplinary Committee.

In addition to the solicitor having to make this personal declaration he must every year produce the books, accounts and documents relating to his practice to a professionally qualified accountant for audit, and such accountant must, under the Accountant's Certificate Rules, 1946, give a written certificate that he has examined such books, accounts and documents and that from such examination and from the information and explanations given to him he is satisfied that during the accounting period the solicitor has complied with the Rules, or has so complied except for trivial breaches all of which were rectified on discovery and none of which resulted in any loss to any client. If any breach of the Rules is not trivial then the accountant must give details on the back of his certificate. The accountant's certificate has to be sent by the solicitor to The Law Society every year, and should it disclose breaches of the Rules other than trivial breaches, then the Professional Purposes Committee will consider the matter and instruct the Investigation Accountant and Internal Auditor, who is a member of The Law Society's permanent senior administrative staff, to inspect the solicitor's accounts, which accounts have to be delivered to The

[17] The Law Society, *Annual Report of the Council*, 1952–1953, p. 29.

Law Society for that purpose. Should the report of the Investigation Accountant justify it, The Law Society will bring the matter to the notice of the Disciplinary Committee.

During the year 1952–1953 the Professional Purposes Committee gave instructions for forty-seven inspections of solicitors' accounts to be carried out.[18] As there are some 18,000 practising solicitors, it is clear that practically every solicitor is maintaining professional standards, which is of the utmost importance when one realises that millions of pounds sterling are entrusted every year by clients to solicitors up and down the country.

THE DISCIPLINARY COMMITTEE

The Disciplinary Committee[19] is appointed by the Master of the Rolls, and it is quite independent of The Law Society. Appeal lies to three judges of the High Court from decisions of the Committee.

Every solicitor, whether or not he is a member of The Law Society, is subject to the jurisdiction of the Committee, which consists of seven solicitors, and it has wide powers to punish a solicitor found by it to have been guilty of unprofessional conduct. It can order that the solicitor's name be struck off the Roll of Solicitors; that he be suspended from practice for a specified period; or that he be censured. It can impose a fine on the solicitor up to £500, which money is forfeit to Her Majesty, and it can order the solicitor to pay the costs of the inquiry.

The jurisdiction of the Committee extends to solicitor's clerks, as the Committee has power to order that no solicitor shall, in connection with his practice as a solicitor, take or retain the solicitor's clerk named in the Committee's Order into or in his employment or remunerate him without the written permission of The Law Society.

LEGAL AID

I turn now to the matter of legal aid, and I do so with especial pleasure because it provides further evidence that the members of the profession are not avaricious, unprincipled, and self-seeking.

Until the year 1913 the procedure under which poor persons

[18] *Ibid.*, p. 36.
[19] Constituted under the Solicitors Acts, 1932–1941.

who sought to sue or defend as poor persons was regulated by Rules of Court. If the poor person could show that he was not worth £25 he was excused court fees, and was entitled to have assigned to him a solicitor or barrister, or both, to assist him. It was no one's duty to make inquiry or investigation into the matter before the Order was made. The result was that frivolous and vexatious actions were brought, causing unnecessary expense and loss of time. It was in these circumstances that, early in 1913, The Law Society passed a resolution that it was desirable that The Law Society should publicly show its interest and its willingness to co-operate in measures facilitating the means of access for poor persons to efficient and honest legal advice and assistance. Nothing effective took place until after the First World War, but immediately upon its cessation certain new Rules came into operation, and the office which had been set up in London as a Government Department to deal with the procedure was overwhelmed with applications as a result of cases which had accumulated during the war period. In 1923 the congestion had become so serious that a Government Departmental Committee was set up to consider remedies. The position was considered by the Council of The Law Society, who came to the conclusion that if The Law Society and the Provincial Law Societies were allowed to take over the whole and sole control of the work the difficulties which had caused the congestion would disappear. They submitted a scheme by which all applications to be admitted as a poor person were to be made to committees appointed by the Lord Chancellor upon the nomination of The Law Society or of the Provincial Law Societies. This scheme was accepted in 1926, and between that date and the outbreak of war in 1939 over 70,000 applications were considered and dealt with. The work was done gratuitously.[20] The profession took not a single penny in the way of costs. All that the solicitor received was his out-of-pocket expenses; for example, the actual sums he spent on witnesses' expenses. This procedure —known as the Poor Persons Procedure—operated until October 2, 1950, on which date the present Legal Aid Scheme came into operation.

In addition to administering the Poor Persons Procedure, The Law Society maintained after 1939, at the request of the

[20] *Handbook of The Law Society* (1938), p. 40.

Admiralty, War Office, and Air Ministry, a Services Divorce Department to deal with the unhappy matrimonial difficulties of members of the Armed Forces, and this Department dealt with thousands of cases.

The Lord Chancellor in the course of the Address on the present Legal Aid Scheme which he broadcast on October 2, 1950, pointed out that out-of-pocket expenses can amount to a lot of money and that that had, by itself, been quite sufficient to prevent some people from fighting their cases. He frankly admitted that the Poor Persons Procedure had meant that a lot of people had been unable to go to law, however good their cases might have been, simply because they were either too poor to meet the out-of-pocket expenses or because they were not rich enough to risk the whole heavy cost of a lawsuit at their own expense. The present Legal Aid Scheme ends this injustice so far as the High Court and Court of Appeal are concerned as it covers (with certain exceptions)[21] proceedings in those courts. The legal aid consists of representation by a solicitor and, so far as necessary, by a barrister, and includes all such assistance as is usually given by lawyers in legal proceedings. A person who wants legal aid has to apply to a Local Committee for a civil aid certificate, and he has to show that he has reasonable grounds. When the aid certificate has been granted, the applicant himself is entitled to choose his solicitor from the appropriate panel,[22] and the selected solicitor is bound to accept the case unless he has good reason for refusing to do so. The relationship between the assisted person and his solicitor is exactly the same as though the assisted person were employing the solicitor in the ordinary way, *i.e.*, no one is able to force the solicitor to disclose to any one, not even to a court, what has passed between him and the assisted person, unless the latter waives his privilege, which no one can force him to do. This is a most important matter, as it precludes, for example, a Government Department demanding that the solicitor shall send to the department confidential information given to him by the assisted person. The Scheme is flexible enough to enable some married people with £700 a

21 The most important exceptions are actions for libel, slander, and breach of promise of marriage.

22 If the case of the assisted person is for divorce and the contribution he has to pay is not more than £10, then a solicitor from The Law Society's Divorce Department will be chosen to act for him.

year, and some single persons with about £500 a year, to qualify for legal aid, but the income limit is normally £420 a year.

The Legal Aid Scheme, which is a national scheme and consequently financed by the State, is not run by any Government Department or by local authorities. Parliament has entrusted the entire administration of the Scheme to The Law Society, and the solicitors' profession is the first profession to be entrusted with the administration of a national scheme. This is remarkable proof of the public confidence reposed in the profession.

During the year ended March 31, 1953, 54,519 applications for legal aid were received, 35,017 civil aid certificates were issued, bringing to over 88,000 the total number of certificates that had been issued up to that date. These figures indicate the vast amount of work involved and the great number of citizens who, without the Scheme, would have been denied justice. The solicitors who serve on the Local Committees and the Area Committees receive a small fee for attending committee meetings, but receive no remuneration for the considerable amount of work involved in perusing, before the meetings, the papers and documents relating to the cases to be considered at the meetings themselves, while the solicitors who act for assisted persons receive only 85 per cent of their normal fees.

Great responsibility rests upon the profession to see that the benefits under the Scheme are not abused. In this, as in all other professional work, the individual solicitor must be a person of high principle and so be able to resist any temptation. The solicitor has the right to give up a case if he thinks the assisted person has required the proceedings to be conducted unreasonably, so as to incur an unjustifiable expense to the Legal Aid Fund, or has required unreasonably that the proceedings be continued.[23] The solicitor acting for an assisted person should never fail to make a proper exercise of this power. Further, if before the proceedings are launched the solicitor has reason to think that a judgment, if obtained by the assisted person, would be fruitless even though there are reasonable grounds for action, he should bring that fact to the notice of the appropriate Area Committee, and if in the course of the legal proceedings themselves it appears to him that the proceedings must be fruitless he should advise

[23] Reg. 14 (7), Legal Aid (General) Regs., 1950.

his client (the assisted person) to discontinue the proceedings if this can be done without prejudice to his client.[24]

PROFESSIONAL REMUNERATION

A word or two now on a topic about which the public has some extraordinary ideas, and which gives the profession itself a great deal of trouble—solicitors' costs.

The man in the street seems to have the strong impression that a solicitor can charge his client any amount he likes. What an odd idea! The solicitor is the only independent professional person in this country whose professional remuneration is regulated by Act of Parliament and Rules of Court. A distinction is drawn between non-contentious and contentious work.

As regards non-contentious work, if it is a land transaction there are statutory scales fixing the remuneration, which is based on the amount involved, for example, the purchase price. A solicitor must not charge more than the statutory scale, and has to be very careful, should he reduce his fee, not to be guilty of undercutting, as this is a breach of professional etiquette. Any work, not being contentious business, for which no charge is prescribed by these statutory scales is governed by what is known as Schedule II, as is any business in respect of which the solicitor has elected to charge under this Schedule. Schedule II authorises the solicitor to charge such a lump sum as may be fair and reasonable having regard to all the circumstances of the case and, in particular, to (1) the complexity of the matter or the difficulty or novelty of the questions raised; (2) the skill, labour, specialised knowledge and responsibility involved on the part of the solicitor; (3) the number and importance of the documents prepared or perused, without regard to length; (4) the place where and circumstances in which the business or any part thereof is transacted; (5) the time expended by the solicitor; (6) where money or property is involved, its amount or value; and (7) the importance of the matter to the client. Assume that a solicitor has sent to his client a bill in respect of work covered by Schedule II and that the client disputes the amount? What are the client's remedies? He has two. He has a right[25] to have the bill taxed by an official of the Supreme Court known as

[24] (1952) 49 *The Law Society's Gazette*, p. 103.
[25] Under Solicitors Act, 1932, ss. 66, 67 and 68.

the Taxing Master, and if the client takes this course then the solicitor must satisfy the Taxing Master as to the fairness and reasonableness of his charge.[26] If the Taxing Master allows less than one-half of the amount charged, *i.e.*, if he reduces it by more than one-half, he must bring the facts of the case to the attention of The Law Society.[27] The other right of the client entitles him to require his solicitor to obtain a certificate from The Law Society certifying whether the sum charged is fair and reasonable or, if it is not, what is a fair and reasonable sum, and the sum so certified by The Law Society, if less than that charged, will, in the absence of taxation, be the sum payable.[28] But the client must exercise this right before the bill has been either taxed or paid.[29] A further protection to the client is that before the solicitor brings legal proceedings against the client to recover costs on a bill delivered under Schedule II he must, unless the costs have been taxed, have drawn the attention of the client in writing to his, the client's, rights to have the bill taxed or to require the solicitor to obtain from The Law Society the certificate just mentioned.[30]

The Council of The Law Society has informed solicitors that if a client requires his solicitor to obtain a certificate from The Law Society the Council will require the solicitor to complete a questionnaire supplying details under each of the seven heads set out above, and that solicitors must therefore realise that they should keep such records as will enable them to substantiate their charges.[31] Looking at the seven heads which solicitors are directed to keep in mind when assessing the lump sum, it seems to me that they do provide an incentive for a solicitor to specialise, as obviously a specialist will be entitled to a higher fee than one who has not the skill and specialised knowledge.

As regards contentious business, *i.e.*, litigation, solicitors' charges are governed by Rules of Court, and they are always

[26] Solicitors' Remuneration Order, 1953, proviso (*d*) to subclause (7) of paragraph 6.
[27] *Ibid.*, proviso (*e*).
[28] *Ibid.*, proviso (*a*).
[29] *Ibid.*, proviso (*c*).
[30] *Ibid.*, proviso (*b*).
[31] This system of charging a lump sum in respect of work covered by Schedule II operates in respect of such work done on and after March 1, 1953. The system of itemised charges (the 3/4, 6/8, etc. so familiar to the client) still operates in respect of work done prior to March 1, 1953, but it will soon be a thing of the past.

vetted by the Taxing Master. The bill has to be prepared on an item basis, and each item charge is carefully scrutinised by this official. It is a widely held view that the present system is unfair to the profession. Take this actual case. Upon taxation the sum allowed was £52 10s., which was about one-half of what would represent fair remuneration for the work done. As the case was under the Legal Aid Scheme the solicitor only received 85 per cent, *i.e.*, £44 12s. 6d. The plaintiff was a Polish refugee with an exceptionally inadequate command of English, so that the services of an interpreter were essential. The plaintiff's solicitor was allowed £4 os. 3d. for each day's attendance in court, but the interpreter, himself a Polish refugee, received an allowance of £7 7s. a day.[32]

The drawing up of a bill of costs for taxation is always a repellent task, and in more ways than one costs are a curse and taxations a trial. Specialisation is really necessary, as solicitors' costs is a branch of law itself, as is shown by the fact that a standard work, *Butterworth's Costs,* consists of two volumes and runs to 1,781 pages.

The permitted costs for contentious business are so inadequate that it is no longer possible in litigation alone to carry on a practice remuneratively. The present authorised charges stand at only 50 per cent above the level fixed in 1883. Sir Dingwall Bateson, the President of The Law Society in 1952–1953, has seen bills of costs delivered in the 1700s which contained almost precisely the same item charges as are now allowed. The Council of The Law Society has represented to the Lord Chancellor that the solution is to dispense with detailed charges altogether and to allow a solicitor, like other professional men, to charge his client a sum which is fair and reasonable. There the matter rests at the moment.

RELATIONS BETWEEN SOLICITORS AND BARRISTERS

In looking at the present and the future a glance at the past may be rewarding.

Holdsworth, in his *History of English Law,* tells us that in the Middle Ages solicitors were not members of the legal profession, but that by the end of the seventeenth century they were as much part of it as the attorneys,[33] and the cause for this rise

[32] (1953) 50 *The Law Society's Gazette,* p. 59.
[33] 6 Holdsworth, *History of English Law* (1937), p. 448.

of solicitors as a then new class of professional men must, says Holdsworth, be looked for in the limitations upon the sphere of the attorney's activity. The technicality with which the office of attorney had come to be surrounded gave rise to solicitors as a new professional class to meet the new needs occasioned by new legal and social developments.[34] Just as the growth of the new courts and councils of the sixteenth century—in particular the Star Chamber, the Court of Chancery, and the Court of Requests—and the new work and new needs introduced by the jurisdiction of these courts and councils, helped to free English law from the technicalities which were cramping its development, so the rise at the same time of solicitors helped to free the attorney's profession from some of the restrictions which its medieval origin had imposed upon it. In fact, the professional growth of the solicitors so broadened and liberalised the organisation, powers and capacities of the attorney's branch of the legal profession that the two branches had amalgamated by 1750 to form the solicitors' profession.[35]

History seems to be repeating itself. The legal and social developments of the present century have occasioned new needs, and the State, quite rightly, has not been slow to provide them. For example, the developments in the agricultural industry, such as the statutory powers to compel the landowner to observe rules of good estate management, and making both owners and occupiers liable to supervision and dispossession, and the introduction of the State as a partner in that industry; the fundamental changes in the land law which occurred when the Town and Country Planning Act, 1947, came into operation in 1948, such as the vesting in the State of all development rights in land and converting the development of land from a right of private ownership to something akin to a social service; and the conversion of workmen's compensation into a State social service. It was foreseen that disputes arising out of these developments were much more likely to involve matters of national policy and public administration than points of law, and so jurisdiction as regards such disputes has been given, not to the ordinary courts of law, but to administrative tribunals. To have entrusted the adjudication of such disputes to the ordinary

[34] 6 Holdsworth, *History of English Law* (1937), p. 450.
[35] *Ibid.*, p. 457.

courts would have resulted in frustration of the aims of the developments.

The rise and growth of administrative tribunals are in keeping with modern ideas, and their existence must now be regarded as permanent. This fact, and present-day economic and social conditions, are bound to have, in fact they already are having, an adverse effect on the profession of the barrister. The Bar grew up and flourished in circumstances vastly different from those of today: in circumstances which will never return. The recently published Final Report of the Evershed Committee on Supreme Court Practice and Procedure[36] raises the question of the fusion or amalgamation of the solicitors' profession and the Bar. As the matter, however, did not come within the Committee's terms of reference the Committee could do no more than to suggest that the matter should be fully explored.

The matter is obviously one of great importance, and it must be looked at from the point of view of the public and not from that of any professional or other vested interest.

The President of The Law Society, in touching upon the question of fusion, has said '. . . we have evolved a system under which lawyers are of two kinds. There is the Solicitor, in direct touch with the Common Man, to whom he acts as guide, philosopher and friend in all problems which involve considerations of law; and we have the Barrister, who is in the main a pleader who presents to the Court (with the advantage of his specialised skill and knowledge) the case which the solicitor prepares for him and instructs him to present', and Mr. Crocker went on to say that he thinks our system 'works reasonably well. So long as we respect the unwritten traditions which regulate the division of work between the two branches, so long, to put it bluntly, as we do not poach on one another's preserves, the present system, expensive though it is, is perhaps to be preferred to fusion'.[37]

One hesitates to differ from the views of such an eminent and experienced solicitor as Mr. Crocker, but I cannot agree that the present system is to be preferred to fusion. If the legal profession had to be created today for the first time it would not take its

[36] Cmd. 8878 (1953).
[37] W. C. Crocker, 'Presidential Address' (1953) 50 *The Law Society's Gazette*, p. 435.

present form. There would be one kind of lawyer, namely, the solicitor, who would, of course, have a right of audience in all courts. That being so, it cannot be necessary to have two separate legal professions at the present time, and it would be very wrong to oppose fusion for purely professional reasons. It is not what the two professions want, but what is best from the point of view of the public. No one can seriously contend that every barrister is better qualified to have a right of audience in the superior courts than any solicitor. The latter very often is the lawyer with the specialised skill and knowledge. The time has undoubtedly arrived for the solicitors' profession to pay greater regard to advocacy in that the profession must produce its own specialists in that field. With the exception of the State of Victoria, all the Australian States have fusion, and the solicitor has a right of audience in all courts throughout the Commonwealth. The tendency there is for some solicitors to act purely as solicitors and for their partners to carry out the duties which in this country would be performed by barristers.[38] That is the kind of development which I regard as desirable in this country, and I think it is bound to come. In the meantime should not something be done to put the relations between solicitors and barristers on a more reasonable basis than they appear to rest at the moment?

The Annual Statement of the General Council of the Bar for 1904–1905 lays it down that as a general rule it is improper for a barrister to attend conferences at a solicitor's office, but in exceptional circumstances the rule may be departed from.[39] Even if the rule were reasonable in 1904—fifty years ago—it no longer is so. Quite a lot has happened since 1904. I do not understand why solicitors are so tame about this matter, and put up with the inconvenience caused to them by this rule. It is ridiculous that a leading solicitor, wishing to give work to a very young barrister, must leave his office and go to the young man's chambers if he wants to have a professional talk with him. It is all the more infuriating when the solicitor knows that the work he has given to the barrister is the only work the barrister has on hand, whilst he himself has great difficulty in fitting in all

[38] W. C. Crocker, *loc. cit.*, n. 37 above.
[39] See p. 10 of the Annual Statement referred to: W. W. Boulton, *Conduct and Etiquette at the Bar* (1953), p. 12.

his engagements. Has not the time arrived for the solicitors' profession to insist on suitable modifications of the rule? Further, a rule that surely should go completely is the one made in 1909 which says that a barrister may accompany his solicitor client upon the inspection of documents if in the barrister's judgment it is necessary in the interests of his client that he should personally inspect them.[40] It should be the solicitor, not the barrister, who should have the final word in a matter of this kind. The Council of The Law Society has always taken the view that a solicitor is, as between himself and a barrister, in accordance with the etiquette of the profession, personally liable for payment of a barrister's professional fees, whether or not the solicitor has received from his client money to pay them.[41] As solicitors pay the piper are they not entitled to call the tune? Undue emphasis is put upon the historical fact that the Bar is the upper branch, and the solicitors' profession the lower branch, of the legal profession. Solicitors, however, must not allow themselves to be inhibited by this fact, or allow the development of their profession to be retarded by outmoded traditions. The professional growth of the solicitors during the last fifty years or so has been so great that fusion should now be regarded as a natural and proper development, as was the amalgamation of the solicitors and attorneys two centuries ago.

Meantime the solicitors' profession must continue on its path of progressive development, and must take every opportunity to promote the friendliest feelings between itself and the public. For those reasons I welcome the suggestions made by the President of The Law Society that a Public Relations Officer should be appointed to the permanent senior administrative staff of The Law Society, and that The Law Society should use national advertising as a means of teaching the public how wise it is to go to solicitors for any of the purposes in relation to which they practise. The citizen with bodily ailments turns naturally to his doctor and dentist for relief. 'If he could be taught just as naturally to submit to a solicitor all those business and social and domestic conundrums to which we [solicitors] hold the answers . . . how enormously the public would benefit'.[42] The

[40] *Ibid.*
[41] *Ibid.*, footnote, p. 40.
[42] W. C. Crocker, *loc. cit.*, p. 443.

family solicitor has always been a boon and a blessing to the upper and middle classes. For generations they have regarded him as a confidential friend and adviser. With the advent of the Welfare State the difficulties of everyday life of every citizen have enormously increased, and in this shifting world, when nothing seems secure, what the citizen yearns for more than ever is to be able to turn to a person who is qualified, both technically and intellectually, to guide him safely through his troubles, and who is always prepared, at any time of the day, to treat him and his problems with patience and tolerance, and in a spirit of human understanding. The solicitor, with his high professional qualifications and experience of human affairs, backed by a strong centralised professional organisation, is well able to play that role. This social responsibility and duty the solicitor has willingly assumed, fully conscious that it carries with it the obligation at all times to act as a first-class solicitor should act so that each and every client can unreservedly endorse the view expressed a year or so ago by the Master of the Rolls that a first-class solicitor is 'a man who knows what is right and wise and what is wrong and foolish; a man who sustains his client when things have gone rather ill with him, but who holds him back when he might be inclined to be reckless; above all, a man of whom the rest of the community say, "There is a man I know can be absolutely trusted"'. Possessed of those qualities, and imbued with that spirit, the solicitor can and will play no small part in bringing about that well-ordered and happier life which each and every one of us so earnestly desires.

THE COST OF LITIGATION

Dennis Lloyd

It is generally conceded that litigation is a very expensive undertaking in England. I therefore propose to begin by inquiring why the due process of law should have this unfortunate characteristic in this country, for in considering what reform may be practicable it is vital to distinguish those causes which are inherent in our present legal system from those which are merely accidental and capable of elimination.

I think the high cost of litigation is mainly attributable to the following factors:—

(1) the nature of our procedure, which requires most cases to be proved by oral evidence involving an elaborate process of examination, cross-examination and re-examination of witnesses in open court and subject to technical rules of evidence. Such a procedure, however meritorious in itself, tends to prolong the trial stage of the action—which is inevitably the stage at which the main costs are incurred—and also calls for a highly trained and specialised class of advocates.

(2) The division in the legal profession between solicitors and barristers and the further sub-division of the latter into junior and leading counsel. This results in a case involving at least four sets of costs (that is to say two solicitors and two counsel) and where leaders are engaged there are, of course, six persons to be paid.

(3) The peculiar position in our legal system of the barrister, whose earnings are dependent (save in the case of a few specialists) on fees in connection with litigation of one kind or another. The fact that the high standing of the Bar, both in its own right and as the sole source of recruitment to the Bench, is an essential feature of our legal system involves the corollary that to attract the right type of entrant the rewards must at least be commensurate to the hard work and responsibilities which this profession imposes on its members. Moreover, the well-known difficulty of the 'lean years' of practice at the Bar coupled with the fact that the barrister—unlike the solicitor—depends on litigation practically as his sole source of remuneration, means that such

fees must necessarily be on a fairly substantial scale. Also, as no partnerships are permitted at the Bar and everything has to be earned as a result of the barrister's own personal exertions it is obvious that the volume of work done is no substitute for small fees, though it must be admitted that the amount of work contrived to be performed by some busy juniors at the Bar can only be described as prodigious. The ordinary barrister, however, has neither the constitution nor the number of clients necessary to make an adequate living on the basis of small fees and a vast output.

(4) The absence of fixed days for hearings, involving a great deal of wasted time and money by reason of parties, their witnesses and their lawyers having to wait around sometimes for days before their case is called on, apart from the difficulty of making firm arrangements in regard to other matters, when it is not known within days or even weeks when a case is likely to be reached.

(5) The multiplicity and high cost of appeals.

If this brief analysis is substantially correct it will be seen that many, though not all, of the above causes are deeply rooted in our existing legal system and its long traditions. So long as it is desired to retain those essential features the high cost of litigation which flows as a direct consequence is, I think, inevitable. If our system of litigation is a good one—and apart from the all-important question of costs it is generally conceded that it is—it is unfortunately not one that can be had 'on the cheap'. A solution might be sought in some fundamental recasting of the whole system, as for instance would be involved in fusing the legal profession. On the other hand, some small improvements might be wrought mainly in matters of detail while retaining the present structure unimpaired. What I venture to suggest we cannot do—or at least will achieve only at the risk of imperilling the very basis upon which the present structure rests—is to seek to reduce costs by rendering litigation unremunerative to those whose task it is to conduct it.

It is now three-quarters of a century since the vital reforms of the Judicature Acts recast and modernised our practice and procedure. Many committees have since deliberated on their further reform,[1] but few substantial changes have been introduced

[1] The most recent, prior to the Evershed Committee, were the Hanworth Committee in 1933, and the Peel Commission in 1936.

since 1875. The reforming spirit of the post-war years led in 1947 to the appointment of the Evershed Committee,[2] presided over by the Master of the Rolls, to inquire into the present practice and procedure of the Supreme Court. After six years of hard work, involving several hundred meetings and the consideration of a vast quantity of oral and written evidence, the Committee has now issued its Final Report.[3] This is a massive document of 380 pages which even Her Majesty's Stationery Office—whose charges are always moderate—finds unable to price at less than eleven shillings. In addition there are three Interim Reports[4] of considerable length dealing with particular matters not dealt with in the Final Report.

It will be my main task in this paper to attempt to review some of the more important conclusions reached by the Committee. I think it fair to suggest that any reader of these Reports will be struck by the fact that those conclusions are very largely negative. The Committee recognises that the problem of costs is its 'prime task',[5] but on most of the important issues the result of careful consideration of the pros and cons is a reasoned rejection of any substantial change. Moreover, the vital question of the fusion of the legal profession is not considered at all, as being outside the terms of reference. This in itself is rather surprising —and indeed is commented on in an addendum to the Report by four of the committee members—and the reason for its non-inclusion, namely that a disturbance of the profession would be unfair to those members returning from the war or about to begin their professional careers,[6] seems singularly unconvincing.

I turn now to consider the actual recommendations of the Committee but, as will be appreciated, space will only permit me to refer briefly to the more important of these. At the same time it should not be overlooked that the Reports contain many valuable suggestions in matters of detail.[7] Thus the Committee shows its awareness of the human side of the problem by making a long overdue suggestion that witnesses should be allowed to give their evidence seated.[8] I have often wondered why a male

2 Committe on Supreme Court Practice and Procedure.
3 July, 1953, Cmd. 8878.
4 1st Interim Report, Cmd. 7764 (hereinafter referred to as 1st I.R.).; 2nd Interim Report, Cmd. 8176; 3rd Interim Report, Cmd. 8617.
5 Final Report (hereinafter referred to as F.R.), § 20.
6 F.R., § 24.
7 See the complete summary of recommendations, in F.R., pp. 319–342.
8 F.R., § 308.

witness has to be suffering from heart disease or a female to be in an interesting condition before he or she is invited to be seated while testifying to the court.

The main proposals of the Committee can, I think, best be considered under six heads.

THE 'NEW APPROACH'

The Committee thus heads the first section of its Final Report, and thereby seeks to strike the keynote of the whole Report. As I understand it, the basis of this recommendation is a *cri du coeur* for a change of attitude on behalf of all those concerned in litigation towards the question of costs. The aim is to make the parties, their lawyers and the judiciary more 'costs-conscious' with a view to eliminating unnecessary steps at all stages of an action. To achieve this aim it is admitted that 'education is required',[9] but it is felt by the Committee that, substantially, the existing rules are adequate provided they are applied 'more robustly'. This is a phrase which constantly recurs, as for instance in connection with disallowing the cost of copying unnecessary documents.[10] The Committee do, however, make two concrete suggestions for facilitating this process:

(1) They suggest that in certain cases an analogous procedure to that by way of originating summons in the Chancery Division might be adopted in the Queen's Bench Division. This would enable a plaintiff to state the nature of his case on affidavit and ask for a trial without pleadings. The defendant would then have to set out his defence in an affidavit, and the Master could then order the case to be set down without pleadings. This is indeed similar to what sometimes happens at present under existing O.14 procedure,[11] but is obviously only applicable to cases where there are no issues of fact or these are of a fairly simple kind.[12]

(2) It is proposed to 'strengthen' the existing summons for directions. At the present time this is a fairly formal step taken

[9] F.R., § 225.
[10] F.R., § 413; cf. § 226.
[11] Under existing O.14 procedure, the plaintiff has to 'verify his cause of action' by affidavit, and the defendant to get leave to defend must file an affidavit showing a prima facie defence. The action may then be set down without further pleadings if the issues are sufficiently defined.
[12] For the classes of case to which this procedure is considered appropriate, see F.R., § 99.

after the close of pleadings in which the solicitors or their clerks go before the Master who deals with the mode and place of trial and gives any other direction which is necessary. The average time taken at present is about a minute and a half. In some common law countries—as for instance the United States—an elaborate 'pre-trial procedure' has been evolved in which a conference takes place between the judge and the lawyers on each side, and an attempt is made to limit the issues in the case and to give any necessary directions tending to shorten and simplify the actual hearing.[13] The Committee, however, is not in favour of such a 'preliminary canter' since, to be effective, counsel would probably need to be briefed, and it might well add to rather than reduce the costs, as there would be something like two trials instead of one.[14] What the Committee has in mind is a 'more robust' application of the existing rules—reinforced where necessary[15]—by the Master, who should spend say half an hour on each case. In particular, the Master should certify at this stage whether one or two counsel should be allowed and his decision, subject to appeal, would be final. This would not, of course, preclude a party from employing two counsel at the trial, but it would be a luxury for which he would have to pay himself, win or lose.[16]

With all respect, this seems to be an attempt to get the benefit of the pre-trial conference without its disadvantages and to impose an impossible task on the already harassed and hard-worked Master. Our system is based on the idea that the parties' lawyers are entitled to present their cases in their own way and that it is the job of the lawyer to try to win his client's case within the framework of the rules. Any one who has had to conduct litigation knows that it is quite impossible to foresee precisely how a case may develop, or to know unfailingly in advance what may prove important at the trial. Lawyers cannot conduct cases adequately under our procedure if they are threatened at every stage with being penalised in costs; nor have Masters or any one else such a degree of insight and prescience that in the course of

[13] F.R., §§ 215–216.
[14] F.R., § 218.
[15] F.R., §§ 225–233.
[16] F.R., § 228. This proposal would undoubtedly reduce the number of cases in which leading counsel are employed, and would accordingly be a severe blow to many leaders, for whom there cannot be said to be an excess of work even under present conditions.

a hasty glance through the papers they can take it upon themselves to dictate to the parties how they should conduct the proceedings or what steps or documents may or may not be necessary. Furthermore a lawyer cannot take the risk of losing his client's case in order to save some small item of costs in the interlocutory stage and no sensible client would desire him to do so, however much he may complain when the action is over. There is an extraordinary air of unreality about all this, and indeed this becomes apparent later in the Report when the Committee itself states that the lawyer 'will obviously be embarrassed if he must at frequent intervals say to the client: "If we take this step I must warn you that, if you win, you may not recover the costs of taking it from the other side"'[17]

EVIDENCE AND MODE OF TRIAL

On this the attitude of the Committee is almost wholly negative. It is recognised that English law attaches far more importance to oral testimony than is the case in continental systems but this is attributed to fundamental differences of background and approach which deprive such comparisons of any real value. Thus, in France most business transactions depend—so it would seem—on notarially attested records or at least some written records, and claims for personal injuries are far less common than in this country.[18] Be this as it may, the Committee was satisfied that the administration of justice in this country must continue to be based mainly on oral testimony as at present. Moreover, to abolish the rules of evidence would tend to prolong hearings and thus increase rather than diminish costs.[19] Hence, the Committee confines itself to a few minor recommendations, such as that the Evidence Act, 1938, might be improved in detail and applied 'more robustly',[20] that matters of local or general notoriety, such as the name of a Derby winner, might be proved by reference to a newspaper notwithstanding the hearsay rule,[21] and that experts' reports should be made available for inspection before the trial.[22] The suggestion that proofs of witnesses should

[17] F.R., § 710.
[18] F.R., § 250.
[19] F.R., § 253.
[20] F.R., §§ 272–280. Thus the Committee recommend the repeal of the troublesome limitation on statements made by a 'person interested'.
[21] F.R., § 268.
[22] F.R., § 290; see also on medical reports, §§ 349–355.

be exchanged prior to the hearing is, however, rejected, mainly on the ground that this would tend to increase costs, since these 'proofs' would almost certainly require to be settled by counsel.[23]

It may be ventured that it is on this last point that the Committee has failed to seize an opportunity for a useful reform even within the framework of the present system. The Committee seems here to have overlooked the relevance of the point—referred to in this part of the Report—that in the Chancery Division some eighty per cent of matters are dealt with on affidavit.[24] Moreover, many matters in the interlocutory stages of a Queen's Bench action, such as leave to serve a writ out of the jurisdiction,[25] are based solely on affidavit evidence, and the same applies to such important questions as maintenance and custody in the Divorce Division. If it is true, as the Committee rightly insists again and again, that it is at the trial stage that the main costs are incurred, it is difficult to see why some simplification could not take place by requiring affidavits of the witnesses to be exchanged before the trial. In many cases this might very largely reduce the area of disputed fact and might certainly enable the Master to deal 'robustly' on the summons for directions in confining the issues of fact between the parties. Moreover, the absence of surprise might facilitate settlements, and even if the action goes on much time might be saved by not having to examine the witnesses in chief but simply submitting them for cross-examination, which could then be more strictly confined to the matters which appear from the documents to be in dispute. Even under the present procedure it is always open to a party to require a deponent to attend for cross-examination on his affidavit,[26] but this is comparatively rarely done. In the same way, if affidavit evidence were also universal in Queen's Bench actions the practice might well develop of not requiring the attendance of some at any rate of the witnesses, especially if there is a power—'robustly' exercised—to penalise in costs a party who unreasonably insists on the attendance of witnesses.

[23] F.R., § 301.
[24] F.R., § 271. Affidavits in the Chancery Division and in proceedings elsewhere are of course frequently settled by counsel.
[25] See R.S.C., O. 11, r. 4, under which the court has to determine issues or facts on affidavit evidence in advance of the trial; cf. *Vitkovice* v. *Korner* [1951] A.C. 869.
[26] R.S.C., O. 38, r. 28.

FIXED DATES FOR TRIALS

The obvious convenience in having a definite date fixed for the trial of an action makes it appear somewhat curious that our High Court procedure has long resisted so natural an arrangement. The main reason for such resistance appears to be the desire to avoid the waste of judicial time which may result if cases are settled or disposed of and the judge is left without a list or with an insufficient list on any particular day. Yet, when one contemplates the evils of the present system they seem heavily to outweigh the disadvantages which may result from an occasional or even frequent loss of a few judicial working hours. As the Committee states: 'It is impossible to assess the financial loss suffered by the community, or even by the litigants, owing to dates not being fixed. We are satisfied, however, that it is very considerable. It is not only to be thought of in terms of the time wasted by litigants and their witnesses in waiting about at the courts for their cases to start on the day on which they first appear in the list. It is not merely that the case may not be started at all on that day. . . . The real basis of the loss occasioned by the absence of a fixed date system lies in the fact that when once it is known that a case may appear in the list for trial on some day about a month ahead, no party or ordinary or expert witness can safely make any certain engagement on any day within that period'.[27] 'So far as we have been able to ascertain (the Committee adds) England is the only civilised country in the world where litigants are not told, as a matter of course, the date on which their actions will be heard. We find it difficult to believe that it is only in England that it is not in practice possible to do it'.[28]

This matter has previously engaged the attention of successive Committees[29] and, indeed, an experiment was started in 1932 under what were called the New Procedure Rules whereby a limited class of actions was heard on fixed dates.[30] This procedure was abolished in 1937,[31] though it is interesting to note that it was found that under that system not more than one or two cases

[27] 1st I.R., § 61.
[28] *Ibid.*, § 63.
[29] See *ibid.*, §§ 52–59.
[30] R.S.C., O. 38A.
[31] See 1st I.R., § 57 (e).

in a year were not reached on the dates fixed.[32] Moreover, fixed dates are always given in county court proceedings and yet only about 5 per cent of such actions have to be adjourned for want of time.[33] Official Referees in the High Court also successfully operate a system of fixed dates for hearings.

As a result of an interim recommendation by the Committee a system of fixed dates for all witness actions was inaugurated in the Chancery Division in 1948[34] and, though the original scheme had to be modified in 1949,[35] the revised scheme has since been functioning, though with what degree of success seems to be a matter of dispute.[36]

In its first Interim Report the Committee also recommended such a scheme to be introduced into the Queen's Bench Division.[37] The proposal is that a Master in Charge of the Lists should be appointed and application should be made to him (with information as to the probable length of trial, number of witnesses and quantity of documents) for a date to be fixed convenient to the parties, their witnesses and counsel, so far as practicable.[38] The Committee recognised that some increase in judicial strength might be required, but hoped that the new system might come into operation not later than Michaelmas term, 1950.[39] Unfortunately, however, nothing has yet been done to replace the existing arrangements in the Queen's Bench Division. It may be added that this recommendation only applied to London anyhow, as the Committee found itself unable to devise a workable scheme of fixed dates for trials at Assizes.[40]

ASSESSMENT OF COSTS

Costs in England are, broadly speaking, based on the indemnity system, though the indemnity is by no means a full one. Under this system the losing party normally pays the winner's costs,

[32] *Ibid.*, § 101.
[33] *Ibid.*, § 26.
[34] 1st I.R., §§ 65–83.
[35] 1st I.R., § 72.
[36] 1st I.R., § 82. Thus there has been much less loss of judicial time than was originally anticipated, though in this respect the 'non-witness list' has served as a 'cushion' in the Chancery Division.
[37] 1st I.R., §§ 97–105. The introduction of fixed dates might do much to eliminate the evils of the late return of briefs and non-attendance of leaders, referred to in §§ 791–792 of the Final Report.
[38] 1st I.R. § 103.
[39] 1st I.R., § 105.
[40] 1st I.R., §§ 119–135.

but only on a 'party and party' basis, which means that the winning party's bill of costs has to be taxed by a Taxing Master who will strike out or reduce any items found by him to be excessive or unreasonable. The total bill represents the 'solicitor and own client' costs, and the difference between the two will have to be paid out of the winning party's own pocket.[41] The Committee, however, records that it was satisfied that in the average case there was no foundation for the suggestion that there was any vast difference between the total bill and the party and party costs.[42]

The Committee carefully reviewed alternative methods of assessing costs but felt constrained to find that no alternative suggestion was both practicable and desirable within the framework of our legal system. In the course of this review the Committee examined the methods employed in other legal systems. Thus, in the United States no costs are recoverable, but this is only rendered practicable by permitting lawyers to charge on a contingency basis, which is regarded as repugnant to our legal traditions. No doubt, from a plaintiff's point of view, there is something to recommend a system under which he pays nothing even to his own lawyer if he loses and a percentage of the sum recovered if his claim is successful, but it is probably true that it is difficult to maintain a very lofty system of professional ethics under such arrangements; and some may think that the experience of professional practices in America is not very encouraging in this respect. Another method of charging costs is, as in Germany, to make the amount directly proportionate to the sum at stake. As the Committee rightly points out, however, such a system is really only workable under a unified legal profession and can only be worked cheaply where (as in Germany) the lawyer has other and more important sources of income than litigation.[43] Similarly, any attempt to introduce rigid scales of costs (as in the county court) would be undesirable for many reasons and, in particular, because they would undoubtedly tend to decrease the remuneration of both solicitors and barristers, both

[41] There are also so-called 'solicitor and client' costs; there seem to be some six distinct bases of charging such costs; see F.R., § 718; and cf. *Gibbs* v. *Gibbs* [1952] P. 332. The Committee recommends that the term 'full action costs' should be substituted for 'solicitor and client costs' (§ 720).

[42] F.R., § 681.

[43] F.R., § 694.

of whom the Committee recognised were not over-remunerated under the present system.[44] Moreover, such a system might have the undesirable consequence of encouraging the growth of a body of cut-price solicitors ready to undertake litigation on the basis of party and party costs alone.[45]

As regards solicitors' costs, the Committee points out that these really fall under two heads, namely an assembly of small items charged by reference to an official scale contained in Appendix N to the Rules of the Supreme Court, and the charge for instructions for brief. It is only this latter item which is, so to speak, at large, in the sense that the sum charged is a discretionary item which alone represents the solicitor's reward for the skill and industry which he has devoted to the case. The Committee states that it was satisfied that there was no evidence that solicitors made excessive charges for this item,[46] and except for a proposal that Appendix N should be revised in detail,[47] no recommendations were made affecting the present system of solicitors' charges.

COUNSEL'S FEES

Since these (together with the solicitor's charge for instructions for brief) represent a substantial part of the costs of litigation, the basis upon which counsel is remunerated engaged the close attention of the Committee and produced some of the more controversial proposals contained in the Final Report. It is well before examining these to say something first about the Committee's general findings in regard to practice at the Bar.

The Committee, in referring to those peculiar features of the barrister's profession to which I have already alluded, and also to the position which arises when a leader is engaged, makes certain general observations which I think deserve citation. 'We recognise (the Committee states) the value of the contribution made to our way of life by members of the Bar, and therefore we do not forget that, if such contribution is to continue, the profession must be such as to attract men of the necessary

[44] F.R., § 707.
[45] *Ibid.* For other suggested methods of assessing costs which were considered but rejected by the Committee, see F.R., Section 10.
[46] F.R., § 54.
[47] F.R., § 739. The Committee however considered that it was itself not competent to revise the Appendix and therefore made no specific recommendations.

qualifications to its ranks. . . . We are satisfied that the junior barrister employed on his own is by no means overpaid. Indeed when regard is had to the character and extent of the necessary training and the responsibility of the work done, we believe that a busy junior who had no briefs with leaders would have to work extremely hard for a reward that could not possibly be regarded as extravagant[48] . . . [And even where Queen's Counsel are employed] the number of cases in which what have been called extravagant or 'fancy' fees are charged is very small . . . But such cases attract publicity and we have no doubt that in these cases the amount of the fees charged are frequently very much exaggerated in the press and elsewhere'.[49]

In the light of these findings it is a little strange to see the matters against which the Committee directs its attack. Substantially these fall under three heads:

(1) *The barrister's clerk's fee.* By long standing custom the fee to counsel, reckoned in guineas, has a further sum added which nominally represents the clerk's fee. The scale remains substantially what it was in 1846. Thus, for instance, the normal two guinea fee for a conference is in fact £2 7s., and the fee for a ten guinea brief is £11. The actual mode of remuneration of the clerk is, of course, a matter of arrangement between the barrister and his clerk and a common practice at the present day is to pay the clerk a percentage of the gross fees earned. The Committee holds that the system of separate charges for the clerk is an anachronism and ought to be abolished. At the same time, it expresses the hope that this will not lead to any general increase in the barrister's own fee. In other words, if no such increase is to occur, and it is difficult to see how it can, there is to be something like an all-round reduction between 5 and 10 per cent in the barrister's gross remuneration. This, of course, will hit particularly the younger members of the profession whose

[48] Since the Final Report appeared, an interesting survey of barristers' earnings has been published in *The Times,* based on those in the best sets of Chambers in the Temple. This reveals that juniors who have practised for 20 years average £2,700 a year, but of the rest only half earn more than £500 and a fifth more than £1,000 (*The Times,* August 13, 1953). 'Only the most able and industrious (the correspondent adds) find their way into such Chambers; the standard of remuneration is substantially less in others'. As to 'silks', it is stated that 'a competent Q.C. can reasonably hope, with luck, to earn £3,000 to £5,000 a year'.

[49] F.R., §§ 765–771.

individual fees are small, since it is on the small fees that the clerk's portion is most considerable.

(2) *The two-thirds rule.* Under this rule a junior is entitled to a fee equal to two-thirds of that paid to his leader. This rule has long been subject to a good deal of criticism (much of it uninformed) and a few years ago it was modified by a proviso that where the leader's fee exceeds 150 guineas the amount by which the junior's fee is to exceed 100 guineas is a matter of negotiation. This limitation, incidentally, was introduced on the express understanding that the junior's other fees (especially on interlocutory matters, where fees are notoriously low, being virtually unchanged for about seventy years) would be treated more liberally. This undertaking has, in fact, never been implemented except for a recent and almost negligible increase of the minimum fee from one guinea to two guineas.

The basis of this rule is, of course, a very necessary restrictive practice (if one may use the unpopular language of trade unionism) to protect the junior who, having done all the difficult interlocutory work for low fees, would find himself unable to make up for this at the brief stage. For, as the Committee points out, 'where a client has only limited resources available, there would be a tendency for the lion's share to go to the chosen leader, leaving very little for any junior'.[50] Moreover, in the ordinary run of cases the junior under this system gets no more and sometimes less than he would get if he did the case alone. It is only in the exceptional case where the party desires to engage a fashionable and expensive leader that the junior may receive substantially more than his normal fee. In this event, the case will no doubt be an important one and the client will be able, and think it worth his while, to pay substantial fees. Nor is it altogether clear why the wealthy litigant is in need of special protection, particularly when the effect of this occasional bit of gilt on the ginger-bread is instrumental in keeping down costs in the great majority of cases which do not go to trial. I would add that the popular notion that when a leader is engaged the junior has nothing to do but sit behind him is quite fanciful. For, quite apart from sharing in the conduct of the case, leaders

[50] F.R., § 859. The same reason is at the root of the rule prohibiting a leader from being employed without a junior, which the Committee saw no case for relaxing (§§ 861–863).

are liable to fall ill or suddenly to be engaged elsewhere and the junior has the responsibility of being able to carry on on his own in any eventuality. For this reason, also, it is quite untrue that the junior's responsibility is lowest when a fashionable silk is employed to lead him.

The Committee recognises, for the reasons I have mentioned, that the rule cannot simply be abolished but proposes to substitute a new rule, no less arbitrary than the two-thirds rule, but on a lower scale.[51] Thus, for instance, on a leader's fee of 300 guineas, the junior's proportion would be reduced from 200 guineas to 127 guineas.

(3) *Refreshers.* Counsel's fee marked on his brief covers a hearing lasting one day, together with the preparation needed for the case. There is no further remuneration, of course, payable for time wasted in waiting for the case to come on. If the case lasts more than one day refreshers are payable for each further day (reckoned as five hours of actual hearing), the amount of these being a matter of arrangement, and usually varying between one-third and two-thirds of the brief fee. The advantage of this system is that it enables the actual brief fee even of a long case to be kept at a reasonable level, so that if the case is settled 'in the corridor', as we say, just before coming on, or in the early stages of the trial, the full cost of the trial will not have been incurred. The main disadvantage, and one which is easily curable, is that solicitors do not always have the wisdom to agree the amount of the refreshers when the brief is delivered, with the result that the client sometimes gets a much bigger bill for counsel's fees than he expected. This applies especially to a winning party, since Taxing Masters are inclined to deal rather more ruthlessly with refreshers than other items.

In substitution for this system, the Committee proposes a fixed scale. Thus, on brief fees of seventy-five guineas or over the refresher is to be 25 per cent with a minimum of twenty guineas and a maximum of fifty guineas a day. On fees up to

[51] F.R., §§ 864–865. The proposed scale is as follows:—

Leader's fee	*Junior's fee*
Not exceeding 50 guineas.	Two-thirds.
Not exceeding 100 guineas.	Two-thirds of 50 guineas plus one-half of the excess.
Exceeding 100 guineas.	Two-thirds of 50 guineas plus one-half of the second 50 guineas and one-third of the excess.

twenty-five, fifty and seventy-five guineas respectively, refreshers should be ten, fifteen and twenty guineas per day.[52]

It is perhaps worth spending a moment to consider the remarkable implications of this proposal. Take the case of a leader with seventy-five guineas marked on his brief. If the case lasts several days his remuneration will be at the rate of twenty guineas a day. Reckoning five hours for the hearing and, say, two hours for preparation this works out at three guineas an hour for a man at the top of his profession. Compare this with the fee-earning capacity of (say) the eminent medical specialist or accountant and bear in mind that it is only the exceptional leader who is able to do more than one case at a time, and few who have sufficient work to keep them continuously engaged throughout the year. I would venture to say that a fixed scale of this kind must either have the effect of gravely depressing the professional standard of the Bar *vis-à-vis* other professions, or alternatively would simply have the undesirable consequence of making the level of initial brief fees a good deal higher than they are already in cases which are anticipated to last several days. Neither effect would appear particularly desirable.

Having thus found out the Achilles heel of the profession and pierced it at its weakest point the Committee goes on to make this remarkable avowal. 'The recommendation we have made will involve *beyond doubt, substantial sacrifice to the junior Bar as a whole.* As we have already had occasion to observe, there seems no doubt that for much of the responsible work that he does, the junior's remuneration is unduly low. We think the junior Bar is entitled to require, that if it is to suffer the sacrifice, it should in other matters be properly remunerated'.[53] The Committee, however, does not indicate how this is to be done, nor is this surprising since many of its earlier recommendations have been directed to reducing the cost of interlocutory work. Nor is it made apparent why, at a time when most other sections of the community have either obtained or are claiming increases to meet the rising cost of living, a junior barrister, whose economic position is already vulnerable enough for the reasons I have given, should be called on to make this sacrifice. It is,

[52] There are also alternative proposals on a comparable scale; see F.R., § 850.
[53] F.R., § 867.

therefore, not without justification that the legal correspondent of *The Times,* on the day the report was published, wrote that 'in view of their previous experience in the matter of fees members of the junior Bar are certain to regard with cynicism a general statement by the Committee that the junior's remuneration is unduly low and that "appropriate steps" ought to be taken to review it'.[54]

APPEALS

As the Committee states, 'there can be no doubt that appeals constitute an important factor in the cost of litigation'.[55] Unfortunately, however, one of the main topics meriting consideration, namely, the position of the House of Lords as a final appellate tribunal was outside the scope of the Committee's terms of reference. On the whole, it seems to me that the main argument in favour of retaining appeals to the House of Lords is that its very existence enables the Court of Appeal to deal in a swift and business-like way with the matters coming before it. The Court of Appeal as it operates at present, with its rapid flow of business and minimum of reserved judgments, discharges its functions admirably; but any attempt to convert it into a tribunal of last resort would inevitably slow down the process of adjudication. Moreover, I venture to think that the very remoteness of the House of Lords from the ordinary hurly-burly of the law courts and the more elaborate consideration it can give to every case is more suitable to a final appellate tribunal. Furthermore, as no appeal to it can be brought without leave[56] only about 5 per cent of cases dealt with by the Court of Appeal in fact make the last lap to the House of Lords.[57] The main objection to the existence of this final right of appeal is the alarming prospect to a successful litigant that he may be taken from court to court and finally, if he loses, be faced with a bill of crippling proportions.[58] In this respect the statute recently passed in New South Wales providing for the payment of the costs of any successful appeal on a question of law out of a fund established for the purpose, seems to point the way.[59] It is, indeed, difficult to follow why a

[54] *The Times,* July 14, 1953.
[55] F.R., § 472.
[56] Administration of Justice (Appeals) Act, 1934, s. 1.
[57] F.R., § 478.
[58] The present scheme of legal aid has not so far been extended to the House of Lords.
[59] See F.R., § 634.

litigant should have to pay for having the mistakes of the judge of a lower court put right. The Committee, while recommending that the New South Wales scheme should be kept under observation, proposes for the present a much more limited scheme under which the Attorney-General might certify that an appeal involves a point of law of exceptional interest, in which event the parties might be given assistance in prosecuting the appeal out of public funds.[60] Neither of these proposals would, of course, have the effect of reducing the cost of litigation, but would merely transfer its incidence to public funds, as in the case of the Legal Aid Scheme.[61]

The only substantial proposal made for actually reducing costs in relation to appeals is the so-called 'leap-frog' proposal, originally propounded by the late Lord Greene. Under this arrangement an appellant might avoid the expense of the two-tier structure by 'leap-frogging' the Court of Appeal and going direct to the House of Lords. The Committee recommends that a High Court Judge should be able to certify that an appeal from his decision is fit for this procedure where the case is one of substantial legal or public importance, and either involves the construction of a statutory provision or is covered by a previous decision of the Court of Appeal which it is desired to test.[62] There seems much to be said for this procedure in the latter case; but a good deal less in regard to questions of statutory construction generally. Very few appeals, in fact, go beyond the Court of Appeal at present, and there seems no reason why a successful litigant should be forced to withstand the more expensive and elaborate form of appeal to the House of Lords instead of the cheaper and more expeditious appeal (which in most instances will be accepted as final) to the Court of Appeal. A further proposal of the Committee, namely that appeals from county courts in respect of claims exceeding £100 should lie on issues of fact (and not merely on points of law, as at present)[63]

[60] See F.R., Section 9.

[61] Under the Legal Aid Scheme, however, counsel and solicitors only get 85 per cent of their fees taxed on a solicitor and client basis; this frequently means of course a good deal less than what would be the costs on a full solicitor and own client basis.

[62] F.R., § 503.

[63] F.R., § 559; appeals under the Rent Acts are to be excluded from this recommendation. The Committee in their 1st Interim Report also recommended that county court jurisdiction should be extended to £300 (§ 28).

is open to the objection that it will unnecessarily increase costs in regard to the very class of matters where these should be kept as low as possible.

Consideration was also given to whether the procedure in the Court of Appeal could be shortened by the submission of written 'briefs' to the court fully setting out the parties' contentions and thus limiting the oral argument. This system was introduced into the United States Supreme Court owing to the extreme pressure of business, the parties' advocates being limited to one hour apiece in addressing the court. It seems doubtful, however, whether such a procedure would be an improvement, since the preparation of an elaborate written case might prove more expensive than dealing with the appeal in the present manner. Moreover, the present Court of Appeal as I have already indicated seems admirably adapted to the swift dispatch of business. Some further time might, however, be saved if the court adopted the practice of reading the papers in advance of the case; the Committee while making recommendations to this effect rightly points out that if this is done the hours of sitting may have to be shortened to give the members of the court time to study the papers before each case is called on.[64]

In connection with the submission of written 'briefs' it is perhaps worth remembering that this system does already prevail in the House of Lords and the Privy Council, but, in fact, little attention is paid to the written case, which is not read out to the court, and seems to have little if any effect in reducing the extent of the oral agreement.

FUSION OF THE PROFESSION

As I have already indicated a careful reading of the Committee's Final Report shows only too plainly that there is very limited scope within the present framework for measures likely to be effective in substantially reducing costs. There remains for consideration the topic so curiously omitted from the Committee's terms of reference, namely, the fusion of the legal profession. Would such a fusion effectively cheapen litigation? The answer is, of course, by no means certain, but on the whole it is reasonably probable that it would, if only for the reasons that the number of persons requiring separate remuneration from each

[64] F.R., §§ 589–590.

case would be reduced and there would be no class of lawyers wholly dependent on litigation for their earnings. As one newspaper put it, however, 'the real and uninvestigated problem is whether fusion is compatible with the maintenance of the quality of British justice, or whether the law, in becoming cheap, might not also become nasty'.[65]

A study of the problems arising out of fusion of the legal profession would deserve a paper in itself, but I feel that I cannot conclude this survey without posing one or two of the points which seem to be relevant to this vital issue. The advantages of the present system are manifest to all those who operate it. Firstly, the status and quality of the Bench have very largely derived from its recruitment from among the outstanding senior practitioners at the Bar. It is very doubtful whether under any other system the Bench could enjoy the same unique authority and prestige. Of course, the high quality of its members is also necessarily dependent on the Bar continuing to attract, as it has done in the past, those possessed of the intellect and character which the judicial office demands. Secondly, there are obvious advantages from the solicitor's point of view. The character and complexity of our legal system is such that no one could possibly be an expert in all its branches. Under existing arrangements the solicitor has at his disposal a compact and highly expert body of specialists whose assistance he can enlist in any matter requiring specialist consideration. Moreover, this result is achieved at the expense of the client and without any personal outlay on the part of the solicitor. From the client's point of view, he has the assurance that his case is likely to have been carefully investigated by an expert in an entirely impartial spirit and on whose integrity the client can rely; further, that if the case comes to trial, it will be conducted by a member of the profession who has specialised in the conduct of litigation. From the barrister's point of view, there is also the advantage of having the client at arm's length and so being able to adopt a more dispassionate attitude towards the prospects and mode of conducting the client's case.

The system, however, is not without some disadvantages. Its successful working depends upon a close degree of co-operation between solicitor and barrister which is not always present. The

[65] *Evening Standard*, July 14, 1953.

individual barrister seems to be unduly dependent on the favours of a few solicitors and has little if any prospect of supplementing his earnings outside the field of litigation. But above all, as I have ventured to explain, the system from the client's point of view is expensive and must, I think, inevitably remain so for the reasons I have given. I am not going to attempt to express any view on the desirability or otherwise of fusing the profession. All I desire to emphasise is that, if the present system is to be retained, measures of so-called reform must not be introduced in the interests of cheapness which are calculated to deprive the system of those features which have rendered it workable in the past.[66] The very sense of frustration at the limited scope for reducing costs within the existing system seems to have tempted the Committee to look around for one or two of the more obvious reductions which might be made in response to popular clamour, without sufficient regard for the consequences of such changes. If fusion is ever likely to come in this country it may well be brought about ultimately by those who, while desiring to retain the benefits of the present system, by introducing tinkering 'reforms' so undermine the position of the Bar as to render its continued existence economically untenable.

[66] Readers of the above will doubtless have read the article by Professor Gower, 'The Cost of Litigation', published (after this paper was delivered) in (1954) 17 *M.L.R.* 1, where the interesting suggestion is made that the most effective remedy would be to confer unlimited jurisdiction on the County Courts and limit the original jurisdiction of the High Court to cases where both parties agree to the action being tried there. Although Professor Gower advances this proposal as not involving fusion, it does seem to me that it would in practice entail fusion, since by drastically reducing counsel's fees, the scheme would deprive the ordinary barrister of the opportunity of making an adequate living. (The solicitor would be less affected because he is not dependant to the same extent on litigation.) Whatever, therefore, may be the merits of this proposal, it cannot, in my opinion, achieve the aim of substantially cheapening litigation within the present professional framework. Whether it is desirable to retain that framework is quite a different question, which I have unfortunately no space to discuss here.

THE INDEPENDENT VALIDITY OF ARBITRATION CLAUSES

Raphael Powell

A party to a contract containing an arbitration clause brings an action on the contract. The purpose of the arbitration clause was to secure the advantages of arbitration over an action in the courts. The other party, therefore, may apply for a stay of the action under the Arbitration Act, 1950, s. 4.[1] The questions relevant to such an application were stated clearly by Lord Macmillan in the leading case of *Heyman* v. *Darwins, Ltd.*:[2] (1) What is the nature of the dispute between the parties? (2) Does this dispute fall within the terms of the arbitration clause? (3) Is the arbitration clause still effective, or has something happened to render it no longer operative? (4) Even if the dispute is within an arbitration clause which is still effective, is there any sufficient reason why the matter in dispute should not be referred to arbitration?

In this paper we are concerned with the third question. Something has happened to the contract containing the arbitration clause. Does the arbitration clause suffer the same fate as the rest of the contract? Or does it possess an independent existence, enabling it to survive whatever misadventures may happen to the main contract? Lord Sumner once said:[3] 'An arbitration clause is not a phœnix, that can be raised again by one of the parties from the dead ashes of its former self'. The metaphor is not entirely apt. We are concerned to see whether the clause can survive even though all around it has been reduced to ashes.

MATTERS AFFECTING THE VALIDITY OF THE CONTRACT AB INITIO

The logical principle is clear. The jurisdiction of the arbitrator depends upon the agreement to submit to arbitration. If that agreement is contained in an arbitration clause which is an

[1] Substantially re-enacting Arbitration Act, 1889, s. 4.
[2] [1942] A.C. 356 at 370.
[3] *Hirji Mulji* v. *Cheong Yue S.S. Co., Ltd.* [1926] A.C. 497 at 511.

integral part of the contract, it ought to stand or fall with the contract itself. If the contract is invalid *ab initio,* the arbitration clause also is invalid and the arbitrator has no jurisdiction.[4] The courts have drawn no distinction between voidness and voidability.

There are, however, several possible modifications of the general principle.

(1) Several members of the House of Lords in *Heyman* v. *Darwins, Ltd.*[5] conceded *obiter* that a clause could be wide enough to allow the reference of a dispute going to the initial validity of the contract. Lord Wright said :[6] 'I see no objection to a submission of the question whether there ever was a contract at all . . . Parties may submit to arbitration any or almost any question'. Lord Porter used similar language,[7] but also added a *caveat* : 'It may require very clear language to effect this result, and it may be true to say that such a contract is really collateral to the agreement supposed to have been made, but I do not see why it should not be done'. To avoid uncertainty the clause should probably provide expressly for the interpretation suggested by Lord Porter, in some such terms as 'This clause shall have effect notwithstanding the existence of any dispute as to the validity of the remaining provisions of this contract'.

(2) A dispute arising out of a contract may *in fact* go to arbitration even though the contract is void. The question of voidness may then not arise until the party in whose favour the arbitrator makes his award seeks to enforce that award. In *Re Boks & Co. and Peters, Rushton & Co. Ltd.,*[8] a contract for the sale of palm nut kernels contained an arbitration clause referring any dispute on the contract. The arbitrators gave an award in favour of the sellers; but the buyers still did not pay for the goods and an order for summary enforcement of the award was obtained. It then appeared that as a result of an order made by the Minister of Munitions, before the contract

[4] *Toller* v. *Law Accident Insce. Society, Ltd.* [1936] 2 All E.R. 952 at 955, *per* Greene, L.J.; *Heyman* v. *Darwins, Ltd.* [1942] A.C. 356 at 362, 366, *per* Viscount Simon, at 371, *per* Lord Macmillan, at 378, *per* Lord Wright, at 384, *per* Lord Porter, at 398; *H. E. Daniels, Ltd.* v. *Carmel Exporters & Importers, Ltd.* [1953] 3 W.L.R. 216 at 226, *per* Pilcher, J.

[5] [1942] A.C. 356.

[6] *Ibid.,* at p. 385.

[7] *Ibid.,* at pp. 392, 398.

[8] [1919] 1 K.B. 491.

was entered into, it was unlawful to deal in palm kernels except under licence. The buyers discovered that no licence had been granted and obtained a stay of execution until the matter could be disposed of. For our present purposes, the relevance of the case is that the buyers were able to set up the illegality of the contract even after the award was made, though apparently it was first necessary for them to get a discharge of the order for summary enforcement of the award. A similar problem came before the House of Lords in *Macaura* v. *Northern Assurance Co., Ltd.*[9] *M,* the owner of a timber estate, sold all his timber to a limited company in consideration of fully paid shares in the company. Then he insured this timber against fire in his own name. A fire took place and he sued the insurers to recover the loss. His actions were stayed and the matter was referred to arbitration under arbitration clauses in his policies. The arbitrator decided that he had no insurable interest in the timber and disallowed his claim. That award was upheld by the Divisional Court and its decision was confirmed by the Court of Appeal in Northern Ireland. *M* appealed to the House of Lords. Before the arbitrator he had allowed the question of his insurable interest to be raised without any objection; but now he challenged the arbitrator's authority to deal with it. The House of Lords held that he could not now call the arbitrator's authority in question. Lord Buckmaster thought that it was too late for him to do so,[10] but that the question of the arbitrator's jurisdiction to decide whether the policy was void for want of insurable interest did not arise. Lord Sumner, however, treated *M* as if he had simply not satisfied an essential condition of his claim, *viz.,* the possession of an insurable interest.[11] The insurers were therefore able to set up the non-fulfilment of that condition at any time, and they had properly done so at the arbitration. In 1953, the Court of Appeal had to consider a question of illegality in *David Taylor & Sons, Ltd.* v. *Barnett Trading Co.*[12] The defendants contracted to sell meat to the plaintiffs at a price in excess of the controlled price and so the contract was illegal. The sellers did not deliver the goods and the buyers' claim for damages was referred to arbitration under a clause in the con-

[9] [1925] A.C. 619.
[10] *Ibid.,* at pp. 628, 629.
[11] *Ibid.,* at p. 632.
[12] [1953] 1 W.L.R. 562.

tract. It was pointed out to the arbitrator that the contract was illegal, but he still awarded damages to the buyers. A motion to set aside the award was dismissed by Lord Goddard because the award was not bad on the face of it; but on appeal the award was set aside on the ground that the arbitrator had been guilty of misconduct in law because he had not taken account of the illegality. Indeed, Denning, L.J., said that the award could not stand even if the arbitrator—who, after all, may not be a lawyer—did not realise that the contract was illegal.[13] But the crux of the matter is that an arbitrator has no jurisdiction to award damages on an illegal contract. In *Smith, Coney & Barrett* v. *Becker, Gray & Co.*,[14] the court was prepared to grant an injunction to prevent an arbitration being held on an illegal contract. If an award has in fact been given, it may well be that the illegality is not apparent on the face of it; the court can then only allege that the arbitrator has been guilty of misconduct in law. It is difficult to see how there could be misconduct if the arbitrator did not know of the illegality and the illegality was not pointed out to him. It would be better, therefore, if in all such cases the award could be set aside simply for want of jurisdiction in the arbitrator.

A more recent case—*Christopher Brown, Ltd.* v. *Genossenschaft Oesterreichischer, etc.*[15]—shows that the face of an award may reveal an ambiguity which may involve the question of the arbitrator's jurisdiction. The award stated that a dispute had arisen regarding the 'execution' of the contract. In the action to enforce the award the defendants pleaded that the contract was not binding between the parties. The word 'execution' was regarded as ambiguous. The statement in the award could mean that there was a dispute as to the validity of the contract and therefore that the arbitrator had no jurisdiction.[16]

(3) A wagering transaction is void. As long as it is not also illegal, an action may be brought on it and the wager can be enforced as long as the Gaming Act is not pleaded. If such an action is brought and the Act is not pleaded, the court could probably grant an application to stay the action where the dispute between the parties falls within an agreement to submit disputes

[13] [1953] 1 W.L.R., at p. 570.
[14] [1916] 2 Ch. 86.
[15] [1953] 3 W.L.R. 689.
[16] See, further, on this case, pp. 91–92, below.

to arbitration.[17] There is nothing in the decision in *Hill* v. *William Hill (Park Lane) Ltd.*[18] to the contrary; and, of course, it is quite common to find that disputes concerning bets on horse races are in fact referred to arbitration. On the other hand, it is unlikely that an action to enforce the award of the arbitrator would succeed if the other party set up the Gaming Act.

(4) The express terms of the contract may provide for avoidance of a party's liability in certain circumstances. In such a case, an arbitration clause providing for reference of disputes under the contract will apply to disputes within those express terms. Most of the cases which illustrate this rule turn on clauses in insurance policies. A person who takes out a policy has been guilty of some fraudulent or innocent misrepresentation, some concealment or non-disclosure which would give the insurers the right to avoid liability on the contract. For some time the true position was obscured by several House of Lords decisions on the question of repudiation.[19] It was thought that the insurers, by avoiding liability on the contract, were repudiating the whole contract and therefore the arbitration clause with it.[20] However, in every case the insurers were relying on a clause in the contract itself enabling them to refuse payment if the assured had made any false statement or not disclosed certain relevant facts in his proposal for insurance. If, then, the insurers denied liability they did so by virtue of an express term in the contract. They were therefore not seeking to avoid the contract, but were relying on the contract itself to excuse them from liability on the ground that a condition precedent to their liability had been broken or not fulfilled. If the contract was relied upon for that purpose it could also be relied upon for other purposes—and, in particular, to enable the insurers to avail themselves of the arbitration clause.

[17] *Hawker* v. *Wood* (1853) 1 W.R. 316. See, also, *Cayzer, Irvine & Co., Ltd.* v. *Board of Trade* [1927] 1 K.B. 269 at 292, where Scrutton, L.J., referred to his experience of 'many arbitrations, where to avoid the rule that the Courts will not hear a case on a p.p.i. policy, the question what is due on the policy has been referred to arbitrators'.

[18] [1949] A.C. 530.

[19] See p. 81, below.

[20] *Goldstone* v. *Osborne* (1826) 2 C. & P. 550; *Jureidini* v. *National British & Irish Millers Insce. Co., Ltd.* [1915] A.C. 499; *Ballasty* v. *Army, Navy & General Assce. Co., Ltd.* (1916) 50 I.L.T. 114; *Furey* v. *Eagle, Star & British Dominions Insce. Co., Ltd.* (1922) 56 I.L.T. 23. Cf. *Richardson* v. *Army, Navy & General Assce. Assocn., Ltd. (1)* [1924] 2 I.R. 96.

That rule has been applied ever since the decision in *Stebbing* v. *Liverpool & London & Globe Insce. Co., Ltd.*[21]

The rule applies to avoidance of liability not only under an express term of a contract but also under an implied term.[22] That was certainly the view of Lord Sumner in *Macaura* v. *Northern Assce. Co., Ltd.*[23]

Several cases show that the rule in *Stebbing's Case*[24] is not confined to insurance policies. For example, it was the *ratio decidendi* in *De La Garde* v. *Worsnop,*[25] where there was a contract to sell a business of manufacturing and selling electric batteries.

(5) The authorities on infants' contracts were recently examined very fully in *Slade* v. *Metrodent, Ltd.*[26] Most of the earlier cases had considered the infant's agreement to submit to arbitration independently,[27] no doubt because the submission was in fact an independent agreement. The tendency was to hold the submission voidable by the infant on attaining his majority. In *Slade* v. *Metrodent, Ltd.*,[28] the infant was party to an apprenticeship deed containing an arbitration clause. McNair, J., said that he had to decide whether the contract as a whole was for the infant's benefit. If it was, then it did not matter that the arbitration clause was not beneficial, though he thought that in this particular case the clause was beneficial. He would not accept the argument that the arbitration clause should be treated as an independent agreement separate from the contract[29] and thought that that argument was not supported by *Heyman*

[21] [1917] 2 K.B. 433, see particularly *per* Viscount Reading, C.J., at 437. Other cases: *Woodall* v. *Pearl Assce. Co., Ltd.* [1919] 1 K.B. 593; *Macaura* v. *Northern Assce. Co., Ltd.* [1925] A.C. 619; *Golding* v. *London & Edinburgh Insce. Co., Ltd.* (1932) 43 Ll.L.Rep. 487; *Freshwater* v. *Western Australian Assce. Co., Ltd.* [1933] 1 K.B. 515; *Toller* v. *Law Accident Insce. Society, Ltd.* [1936] 2 All E.R. 952. Note also the form of the clause in *Stevens & Sons* v. *Timber & General Mutual Accident Insce. Assocn., Ltd.* (1933) 102 L.J.K.B. 337.

[22] For its application in cases of frustration, see pp. 83–85, below.

[23] [1925] A.C. 619 at 631.

[24] [1917] 2 K.B. 433.

[25] [1928] Ch. 17. But see the criticism of this case on another ground in Russell, *Arbitration* (1952), p. 58, n. 2.

[26] [1953] 2 Q.B. 112.

[27] *Rodston* v. *Yates* (1642) March N.R. 111; *Gill* v. *Russell* (1672) 1 Freem. K.B. 63, 139; *Godfrey* v. *Wade* (1822) 6 Moore C.P. 488; *Wrightson* v. *Bywater* (1838) 3 M. & W. 199; *Re Warner & Farnel & Norris* (1844) 2 Dowl. & L. 148; *Bacon's Abridgment, Arbitrament, C*; *Comyn's Digest, Arbitrament, D 2.* In *Wood* v. *Fenwick* (1842) 10 M. & W. 195, the submission was in the contract.

[28] [1953] 2 Q.B. 112.

[29] *Ibid.*, at p. 116.

v. *Darwins, Ltd.*[30] As a result, the arbitration clause must be treated as an integral part of the contract and must stand or fall with it. In the latest edition of *Russell on Arbitration,* the law is stated thus: [31] 'A submission made by an infant would seem to be in the same position as any other contract made by him: that is to say, it is binding if it relates to the supply of necessities or to a reasonable contract of service, or otherwise is (or forms part of a contract that is) plainly for his benefit, but it is voidable by him in any other case'. The result seems to be that an infant's submission to arbitration has no independent life of its own. It stands or falls either with the contract of which it is a part or the contract to which it relates. What happens if *per se* it is plainly for the infant's benefit? As part of an otherwise unbeneficial contract, it is voidable according to *Slade* v. *Metrodent, Ltd.*[32] If it is an independent submission relating to a void or voidable contract, it would seem to be voidable in itself however beneficial it may be *per se.*

MATTERS AFFECTING THE CONTINUED EXISTENCE OF AN INITIALLY VALID CONTRACT

(1) *Repudiation.* For many years the courts had been haunted by the all-too-lively ghosts of three unfortunate decisions of the highest authority—the *Johannesburg Case,*[33] the *Jureidini Case,*[34] and the *Hirji Mulji Case.*[35] In *Heyman* v. *Darwins Ltd.*[36] the House of Lords may fairly be said to have laid the ghosts of the first two cases; but the ghost of *Hirji Mulji* goes marching on and even its body still lies a-smouldering in the grave.

The gist of the argument in the three cases was that if a contract is determined by repudiation or by frustration the arbitration clause must be determined with it—though even in the *Hirji Mulji Case* it was conceded that the clause might possibly be couched in such terms as to avoid this result.[37] In later cases

[30] [1942] A.C. 356.
[31] Russell, *Arbitration* (1952), p. 14.
[32] [1953] 2 Q.B. 112.
[33] *Municipal Council of Johannesburg* v. *D. Stewart & Co., Ltd.,* 1909 S.C. (H.L.) 53.
[34] *Jureidini* v. *National British & Irish Millers Insce. Co., Ltd.* [1915] A.C. 499.
[35] *Hirji Mulji* v. *Cheong Yue S.S. Co., Ltd.* [1926] A.C. 497.
[36] [1942] A.C. 356.
[37] [1926] A.C. 497 at 505. But Lord Sumner had little faith in the possibility, at 511.

the courts were astute to distinguish the three cases in order to give effect to arbitration clauses.[38]

The real problem was that repudiation had been used loosely to mean a number of different things. That was pointed out in the judgments in *Heyman* v. *Darwins Ltd.*,[39] and even earlier by Scott, L.J., in *Toller* v. *The Law Accident Insce. Society, Ltd.*[40] There are four possibilities: (a) denial that there ever was any agreement; (b) assertion that an apparent contract was vitiated by some defect, such as fraud, duress, mistake or illegality; (c) rejection of liability by a party under a term in the contract; (d) refusal by a party to perform his obligations under the contract. In the first two cases the arbitration clause, unless it is wide enough to include these cases, will normally have no effect. In the third case the arbitration clause will apply, because the contract has to be relied upon to show why the party can refuse to be bound. There is no real reason why the term repudiation should not be applied to both the third and the fourth cases. In the third case the party contends that he is justified by the contract in repudiating his liability. In the fourth case he admits that he is not justified in repudiating his obligations but may either admit or dispute the amount of damages he ought to pay. In both the third and the fourth cases there is no repudiation of the whole contract and, therefore, the arbitration clause is capable of applying to the dispute.[41]

An attempt to revive the old controversy in a new form was made in 1948 in *Woolf* v. *Collis Removal Service*.[42] The defendants contracted to remove *W's* furniture to their warehouse for storage, and the contract contained an arbitration clause. *W* alleged that the defendants had stored the furniture in a disused piggery, which was unsuitable for storage purposes. Some of his goods having been lost and others damaged, he issued a writ for damages for breach of contract and/or negligence. The defendants applied for a stay of the action. After *Heyman*

[38] See, *e.g.*, *Champsey Bara & Co.* v. *Jivraj Balloo Spinning & Weaving Co.* [1923] A.C. 480; *Stevens & Sons* v. *Timber & General Mutual Accident Insce. Assocn., Ltd.* (1933) 102 L.J.K.B. 337.

[39] [1942] A.C. 356 at 373, 378, 398.

[40] [1936] 2 All E.R. 952.

[41] *Heyman* v. *Darwins, Ltd.* [1942] A.C. 356 at 361, 373, 378; *Sanderson & Son* v. *Armour & Co.*, 1922, S.C. (H.L.) 117; *Stevens & Sons* v. *Timber etc. Assocn., Ltd.* (1933) 102 L.J.K.B. 337.

[42] [1948] 1 K.B. 11.

v. *Darwins, Ltd.*, plaintiff's counsel could no longer say that there had been a repudiation of the contract by the defendants. He spoke of a 'deviation' or 'fundamental departure' from the contract. The term 'deviation' is often used in relation to contracts of carriage. The argument therefore was that an arbitration clause, or at any rate this particular clause, operated like an exceptions clause in a contract of carriage. If there is a deviation, the carriers are deprived of the benefit of the conditions of the contract including, in particular, the exceptions clause. So then in this case the defendants had deviated from the contract by storing the plaintiff's goods in a one-time piggery and therefore, said plaintiff's counsel, they could not claim arbitration under an arbitration clause the very existence of which was involved in this dispute. The judgment of the Court of Appeal clearly indicated that repudiation by the name of deviation would smell as sweet. It was not insignificant that even contracts of carriage often contained both an arbitration clause and an exceptions clause. Further, not a case had been cited in which the fact or averment of deviation had been held to displace an arbitration clause. So deviation was just repudiation in an extreme form; the decision in *Heyman* v. *Darwins, Ltd.* applied and the arbitration clause survived.[43]

(2) *Frustration. Subsequent illegality.* The argument that the arbitration clause disappears with the contract was also used to contrive its disappearance if the contract was frustrated. If the doctrine of frustration depends upon an implied term in the contract, one would have thought that under the principle in *Stebbing's Case*[44] the arbitration clause must survive. In effect, that was the view taken by Lord Cave and Lord Dunedin in *Scott (James) & Sons, Ltd.* v. *Del Sel.*[45] Lord Dunedin expressed it in this way:[46] 'Either they [*i.e.*, the appellants] must show that there was an express term of the contract which had that effect [*i.e.*, of frustration] or they must show that there was an implied term in the contract which had the same effect. . . . It seems to me, therefore, that they are in this dilemma, that in either view they have got to have recourse to the contract, and if they

[43] But an exceptions clause becomes a dead letter if the repudiation is accepted. *Ibid.*, at p. 17.
[44] See pp. 79–80, above.
[45] 1923 S.C. (H.L.) 37.
[46] *Ibid.*, at p. 41.

have got to have recourse to the contract . . . the dispute is a dispute under the contract'. This argument was fully appreciated by Lord Sumner, delivering the judgment of the court in the *Hirji Mulji Case*.[47] The Court's answer to the argument was that a contract which has been determined is in the same position as one which has never been concluded at all.[48] It admitted that rights and wrongs which came into existence before the frustrating event still remain. But then it was said that the frustrating event determined the contract and with it the arbitration clause. Therefore, the prior rights and wrongs must be dealt with by a court and not by arbitration under a no-longer-existing arbitration clause. And disputes after the frustrating event *a fortiori* could not be dealt with by arbitration because presumably they were now disputes under a non-existent contract. In passing, we may suggest that even if these arguments are accepted, it is doubtful whether they could be applied to the rights and liabilities which now arise under the Law Reform (Frustrated Contracts) Act, 1943. But even before that Act was passed the House of Lords in *Heyman* v. *Darwins, Ltd.* directed its attention to the effect of frustration and dissented from the view of the Judicial Committee of the Privy Council. In the *Hirji Mulji Case* the contract was frustrated before it had even got under way, while it was still executory. Perhaps the Court found some difficulty in launching the arbitration clause in the contract when the contract itself had, in one sense, not been properly launched. But in *Heyman* v. *Darwins, Ltd.* Viscount Simon thought that the *Hirji Mulji* judgment should not be taken as establishing a general rule.[49] The language of an arbitration clause might exclude its application until performance had begun.[50] But, in general, Lord Simon accepted the proposition laid down in *Scott & Sons* v. *Del Sel*.[51]

Since 1942 the tendency has been to follow *Heyman* v. *Darwins, Ltd.* rather than the *Hirji Mulji Case*.[52] In a Scots case in 1948, *Charles Mauritzen, Ltd.* v. *Baltic Shipping Co.*,[53]

[47] [1926] A.C. 497 at 501.
[48] *Ibid.*, at p. 502.
[49] [1942] A.C. 350 at 366.
[50] *Ibid.*, at p. 368.
[51] 1923 S.C. (H.L.) 37.
[52] In the United States, also. See Domke, *Annual Survey of American Law Arbitration* (1952), p. 748.
[53] 1948 S.L.T. 300.

Lord Blackers distinguished the *Hirji Mulji Case* on the ground that the contract before him had been partly performed before the frustrating event, but also indicated his preference for *Heyman* v. *Darwins, Ltd.* In 1953, in *Kruse* v. *Questier, Ltd.*,[54] Pilcher, J., applied the principle in *Heyman* v. *Darwins, Ltd.* to a wholly executory contract, holding that no distinction could be drawn between that kind of case and a case in which the contract is partly performed.

Can we apply the same principle where the contract containing the arbitration clause becomes illegal? Lord Sumner, in *Ertel Bieber & Co.* v. *Rio Tinto Co., Ltd.*,[55] said that the contract, arbitration clause and all, came to an end on the outbreak of war. In this case, as in the *Hirji Mulji Case,* the contract was still wholly executory at the relevant time. In *Slade* v. *Metrodent, Ltd.*,[56] McNair, J., refers to decisions to the effect that an arbitration clause could survive even though the contract has been discharged by, *inter alia,* illegality.[57]

A distinction can be drawn between frustration and illegality. The doctrine of frustration may perhaps depend on the theory of an implied term in the contract; but illegality is absolute in its effect and determines the contract without regard to any question of the presumed intention of the parties. If that is so, we cannot preserve the arbitration clause on the ground that a dispute concerning the continuance or discontinuance of the contract is based on an implied term. We can preserve it only by saying that the arbitration clause was alive at the precise moment of its death and therefore could be resorted to in order to determine the cause of its own death.[58] That possibility may have been present in the mind of Wright, J.,[59] in *Cottage Club Estates, Ltd.* v. *Woodside Estates Co. (Amersham), Ltd.*,[60] when he said that an arbitrator may have to take into account, *inter alia,* supervening illegality.[61] Of course he has to take it into account, but that still leaves open the question whether by so doing he excludes his own jurisdiction. Even if we suppose that

[54] [1953] 1 Q.B. 669.
[55] [1928] A.C. 260 at 291.
[56] [1953] 2 Q.B. 112.
[57] *Ibid.,* at p. 116.
[58] See pp. 92–93, below.
[59] Now Lord Wright.
[60] [1928] 2 K.B. 463.
[61] *Ibid.,* at p. 468.

he has jurisdiction in most cases to determine whether the contract has become affected by illegality, there would in any event be an exception if the resort to arbitration itself could be held to be illegal for any reason.

(3) *Discharge of contract by agreement.* The agreement itself may provide for the life or death of the arbitration clause in the contract. Even if it does not, a principle of survival at the moment of death[62] would allow reference to arbitration of disputes under the original contract. Indeed, it may even be possible to refer disputes as to the validity of the discharge agreement itself, *e.g.*, to decide whether it was invalidated by mistake, fraud or duress.[63]

(4) *Variation of contract.* The normal rule is that the original contract remains in existence save in so far as it is varied by the new contract. In each case the question is one of construction, and several Scots cases on building contracts show that the arbitration clause of the original contract may survive,[64] or even be revived.[65]

(5) *Expiration of contract.* The question whether an arbitration clause survives the expiration of the contract has arisen in several forms.

(a) As a matter of construction, the arbitration clause may be considered to embrace disputes arising after the expiration of the contract.[66] That has happened less frequently in Scots cases, which have distinguished between (i) executorial clauses, providing for the adjustment of disputes concerning the working out of the contract during its actual execution, and (ii) universal clauses, providing for all disputes arising either in the carrying out of the contract or in respect of a breach after the contract has been finally executed.[67] Certainly in the nineteenth century cases the

[62] See pp. 92–93, below.

[63] Domke, *loc. cit.*, at p. 748.

[64] *Barr (J.) & Co.* v. *Stirling & Dunfermline Rly. Co.* (1855) Dunl. (Ct. of Sess.) 582; *Mackay* v. *Parochial Board of Parish of Barry* (1883) 20 Sc.L.R. 697.

[65] *Shanks' Executors* v. *Aberdeen Rly. Co.* (1850) 12 Dunl. (Ct. of Sess.) 781.

[66] *Mackay* v. *Parochial Board of Parish of Barry* (1883) 20 Sc.L.R. 697; *Lord Advocate* v. *Home (Earl)* (1891) 18 R. (Ct. of Sess.) 397; *Scott* v. *Gerard*, 1916 2 S.L.T. 42, particularly at 47, *per* Lord Dundas. For recent American cases, see Domke, *loc. cit.*, at p. 748.

[67] For this distinction, see *e.g.*, *Pearson* v. *Oswald* (1859) 21 Dunl. (Ct. of Sess.) 419; *McCord* v. *Adams* (1861) 24 Dunl. (Ct. of Sess.) 75; *Kirkwood* v. *Morison* (1877) 15 Sc.L.R. 51; *Savile Street Foundry Co.* v. *Rothesay Tramway Co.* (1883) 20 Sc.L.R. 729; *Sanderson & Son* v. *Armour & Co.*, 1922 S.C. (H.L.) 117 at 25, *per* Lord Dunedin.

tendency was to construe the clause as executorial wherever possible, probably because it was felt that the parties should be presumed not to have wished to sidetrack the jurisdiction of the courts except in case of necessity. The executorial clause was favoured because it was designed to provide for disputes in the course of executing a contract which might impede the progress of performance unless they were summarily disposed of. It is noticeable that cases of executorial clauses are very much rarer in the last half-century, perhaps because it has been realised that the greater universal clause includes the lesser executorial clause, and also because there is less distrust of arbitration as a mode of settling disputes. Looking back, however, one cannot help feeling that a great deal of ingenuity was misspent in the efforts of the Scots courts to construe an arbitration clause as executorial.

(b) There may be a more general rule that, at any rate where the contract is for a fixed term, if the contract is continued at will beyond that term the arbitration clause will survive unless it is held to be inconsistent with the terms of that contract. The broad principle of which this rule is a part was stated by Lord Watson in *Neilson* v. *Mossend Iron Co.*[68] Its application to leases and partnerships is well known. In *Gillett* v. *Thornton,*[69] a partnership case, the principle was barely touched upon. But in *Morgan* v. *William Harrison, Ltd.,*[70] the Court of Appeal accepted the broader rule and seems to have acquiesced in the argument of counsel that the rule was not confined to partnerships and leases.

(c) Where performance under a contract has been suspended but afterwards is resumed at a time later than the time fixed by the contract for completion of performance, the arbitration clause in the contract may be held to have been revived.[71]

MATTERS AFFECTING ONLY THE ENFORCEABILITY OF A VALID CONTRACT

(1) *Assignment of the subject-matter.* Very often an arbitration clause will provide in express terms for its enforcement by or against an assignee of the contract. But if it does not so provide,

[68] (1886) 11 App.Cas. 298 at 308.
[69] (1875) L.R. 19 Eq. 599.
[70] [1907] 2 Ch. 137.
[71] *Shanks' Executors* v. *Aberdeen Rly. Co.* (1850) 12 Dunl. (Ct. of Sess.) 781.

can an assignee of the subject-matter of a contract rely on the arbitration clause? In *Cottage Club Estates, Ltd.* v. *Woodside Estates Co. (Amersham), Ltd.*,[72] a building contract contained an arbitration clause. The builders assigned to their bank all moneys due or to be due under the contract as security for an overdraft. Notice of the assignment was given to the building owners, the other party to the contract. Disputes arose as to the amount payable in final settlement and they were referred to arbitration. At the arbitration the parties appearing were the parties to the original contract; but the building owners contended that the builders could make no claim because they had assigned their rights to the bank. The arbitrator made his award in the alternative—(a) that the builders were entitled to recover £448 from the building owners, but (b) that if the court held that the owners' contention was right the builders were not entitled to recover anything. Wright, J., as he then was, said: [73] 'The arbitration clause is a personal covenant and cannot be transferred; nor indeed was it transferred in any sense in this case. The arbitration clause remained in full force and effect as between the original parties . . . and they were entitled to go to arbitration, as indeed they did. The arbitrator . . . was bound to entertain that claim and come to such conclusion as, on the terms of the contract and the relevant considerations, he thought to be just and proper'. He does not deny the arbitrator's jurisdiction. He admits it, and simply says that the arbitrator 'cannot close his eyes to the fact that the claimant, who comes to him for an award that he is entitled to recover moneys from the respondent, has in fact assigned those moneys away by valid legal assignment to some third party who is not before the arbitrator and who is not a party to the arbitration or to the arbitration clause'.[74] In *Aspell* v. *Seymour*,[75] where the facts were very similar, an application for a stay of proceedings was made by the assignee. Lord Hanworth, M.R., distinguished the earlier case on the ground that there the builders had divested themselves of any interest in having an award made in their favour. Here, however, the application was by the assignee and it was argued that he could not apply because he was not a

[72] [1928] 2 K.B. 463.
[73] *Ibid.*, at p. 466.
[74] *Ibid.*, at p. 468.
[75] [1929] W.N. 152.

party to the arbitration clause. The Court held that the contract itself contemplated the possibility of an assignment, but that in any case an assignee could apply for a stay of the action. The Arbitration Act, 1889, s. 4,[76] referred to 'any person claiming through or under' any party to a submission, and that included an assignee of the subject-matter of the contract. Later, in *Shayler* v. *Woolf*,[77] the Court of Appeal held that an arbitration clause is assignable in its nature. It had been argued that an arbitration clause does not bind assigns unless they are specifically mentioned or the contract is expressed to be assignable. On this, Lord Greene, M.R., made several points: (a) the mere existence of an arbitration clause does not prevent the contract from being assignable; (b) whether an arbitration clause does prevent a contract from being assignable depends upon the intention of the parties and the nature of the contract; (c) if the nature of the contract makes it incapable of assignment, the arbitration clause also is not assignable.

Thereafter, the cases assume without question that an assignee can enforce an arbitration clause. That is certainly apparent on the facts of *W. Bruce, Ltd.* v. *Strong (J.)*,[78] where indeed there was a chain of several assignees, and of *Slade* v. *Metrodent, Ltd.*[79]

The converse position, where a party to an arbitration clause relies on it against someone who is not a party to it, arose in *Freshwater* v. *Western Australian Assurance Co., Ltd.*[80] There a car owner insured with the defendants against third-party risks. The policy contained an arbitration clause making an award a condition precedent to bringing an action on the policy. The plaintiff was injured in a car accident and recovered judgment against the car owner and another person. The car owner went bankrupt and the plaintiff sued the insurers, claiming that they were liable to him by virtue of the Third Parties (Rights against Insurers) Act, 1930, s. 1, and the Road Traffic Act, 1930, s. 36 (4). The insurers applied for a stay of the action, relying on the arbitration clause. The Court of Appeal held that they

[76] Now Arbitration Act, 1950, s. 4 (1).
[77] [1946] 1 Ch. 320.
[78] [1951] 2 K.B. 447.
[79] [1953] 2 Q.B. 112. For recent American cases, see Domke, *loc. cit.*, at pp. 746–747.
[80] [1933] 1 K.B. 515.

could do so, even against a plaintiff who was not a party to the policy and indeed might never even have seen the policy. If he wanted to claim under the policy, he had to accept all its terms, including the arbitration clause.

(2) *Absence of written evidence of the contract.* In *Walters* v. *Morgan*[81] it had been held that a submission by parol in respect of a contract which should be evidenced by writing was not enforceable. To-day, however, no agreement for arbitration can be given effect under the Arbitration Act, 1950, s. 4 (1), unless it is in writing, whether the contract to which it refers requires to be evidenced by writing or not. By section 32 of that Act[82] it is provided that, unless the context otherwise requires, the expression 'arbitration agreement' in Part I of the Act means 'a written agreement, etc.'. It is still not altogether certain whether the arbitration agreement need be signed by the party to be charged where the contract itself is not required by statute to be so signed.[83]

(3) *Statute-barred claims.* This is now an academic question. The Limitation Act, 1939, s. 27 (1), now provides for the application of the Act to arbitrations as it applies to actions in the High Court.[84]

(4) *Res judicata.* It is generally well settled that all disputes arising out of a single cause of action must be submitted to the court at one time.[85] Does this rule apply to arbitrations?

This question arose recently in *H. E. Daniels, Ltd.* v. *Carmel Exporters & Importers, Ltd.*[86] Pilcher, J.,[87] thought it doubtful whether all the rights of a claimant arising out of the same cause of action were merged in an arbitration award in the same way as they are merged in the judgment of a court. But he thought that it might be difficult to argue successfully that there was any valid distinction between awards and judgments on the point before him, whatever technical differences there might be between them. The point before him was this. Buyers had obtained an award on the ground of a defect of quality in the goods they

[81] (1792) 2 Cox Ch.Cas. 369.
[82] Re-enacting previous provisions.
[83] See Russell, *Arbitration* (1952), pp. 27–28.
[84] See *Pegler* v. *Railway Executive* [1948] A.C. 332.
[85] *Darley Main Colliery Co.* v. *Mitchell* (1886) 11 App.Cas. 127 at 132, *per* Lord Halsbury; *Conquer* v. *Boot* [1928] 2 K.B. 336.
[86] [1953] 2 Q.B. 242.
[87] *Ibid.*, at p. 255.

had bought. Could they then ask for arbitration again on the ground of misdescription of the same goods when they discovered a hidden fault in the goods on further inspection? Pilcher, J., held that they could, because the arbitration clause provided for reference of any dispute arising out of the contract. It is submitted that this is a strange decision, for several reasons. (a) The general law also provides for the entertainment by the High Court of any dispute arising out of a contract; but no one would suggest that there might be repeated actions arising out of the same cause of action. (b) The purpose of arbitration is to simplify the procedure and lessen the expense for settlement of disputes. The decision in this case could result in a series of vexatious claims for arbitration. Parties would then be better protected by the general legal rule applying to judgments if they did not agree to go to arbitration. (c) In any case, if the first award is enforced by the court, presumably no second arbitration award arising out of the same cause could be enforced, because the matter might be held to be *res judicata*. Indeed, Pilcher, J., held in this case that, had the defendants had the award in the second arbitration stated as a special case raising the question of *res judicata* as a point of law, the Court could have held that no second claim could be made.

The greater part of this paper has been concerned with the apparently logical absurdity of giving an arbitrator jurisdiction to decide that he has no jurisdiction. A possible solution to the arbitrator's dilemma has recently been put forward in an able appreciation of the situation by Devlin, J., in *Christopher Brown, Ltd.* v. *Genossenschaft Oesterreichischer.*[88] He said:[89] 'The arbitrators cannot determine their own jurisdiction. The question which has arisen is what is the position if the dispute embraced not merely the question of whether the contract was validly made or not, which would be in excess of the jurisdiction of the arbitrators to determine, but also other questions which they could properly determine. I think that the answer to that question becomes clear if one bears in mind the fundamental principles which govern the acts of arbitrators in these matters. It is clear that at the beginning of any arbitration one side or the other may challenge the jurisdiction of the arbitrator. It is not

[88] [1953] 3 W.L.R. 689.
[89] *Ibid.*, at pp. 693–694.

the law that arbitrators, if their jurisdiction is challenged or questioned, are bound immediately to refuse to act until their jurisdiction has been determined by some court which has power to determine it finally. Nor is it the law that they are bound to go on without investigating the merits of the challenge and to determine the matter in dispute, leaving the question of their jurisdiction to be held over until it is determined by some court which had power to determine it. They might then be merely wasting their time and everybody else's. They are not obliged to take either of those courses. They are entitled to inquire into the merits of the issue whether they have jurisdiction or not, not for the purpose of reaching any conclusion which will be binding upon the parties—because that they cannot do—but for the purpose of satisfying themselves as a preliminary matter whether they ought to go on with the arbitration or not. . . . There is no presumption that merely because an award has been made it is a valid award. It has to be proved by the party who sues upon it that it was made by the arbitrators within the terms of their authority, that is, with jurisdiction. . . . If the plaintiff . . . fails to prove that the arbitrators had jurisdiction, his action fails, and it is irrelevant whether the arbitrators thought or did not think that they had jurisdiction. Their finding is of no value to him. But if he proves that the arbitrators did have jurisdiction then he succeeds, and his success is not destroyed because the arbitrators themselves went into the matter and came to the conclusion which, *ex hypothesi,* was the right one. In short, any view which is expressed by the arbitrators expressly or impliedly in the award, any finding which can be called a finding that they had jurisdiction does not make the award any better, and likewise does not make it any worse'.

That is the practical solution of the problem. But it can also perhaps be justified in theory. The logical view of the situation is that the arbitrators, giving an opinion upon their own jurisdiction, say in effect—like the gladiators in the Roman arena—*Nos morituri te salutamus;* and, of course, it is equally uncertain whether they are going to 'die' or not. The Roman jurists, however, found that they could decide that a man is alive at the precise moment of his death.[90] It may be that in English law, too, logic can yield to metaphysics in order to give an arbitrator's

[90] G. 2, 232; 3, 200.

award upon the voidness or illegality of a contract a scintilla of life which will endure beyond the grave of his jurisdiction. Indeed, the mantle of Gaius may already have fallen on the shoulders of Lord Porter. In *Heyman* v. *Darwins, Ltd.*,[91] dealing with the effect of frustration, he said : [92] 'I do not think it is an answer to say that the dispute arises after the contract is frustrated. It may, indeed it must do so, if frustration is alleged to have taken place and its occurrence is disputed. The dispute may, but the matter in dispute does not, arise after the contract is over—it is synchronous with the moment of its alleged ending, *i.e.*, it arises at the moment at which it is rightly or wrongly contended frustration took place'.

[91] [1942] A.C. 356.
[92] *Ibid.*, at p. 367.

THE TORT OF INTERFERENCE WITH CONTRACT[1]

D. J. Payne

It is now exactly a century since the Court of Queen's Bench in *Lumley* v. *Gye*[2] held that the old action for enticement was not confined to cases where a servant, in the narrow sense of the term, is induced to break his contract of service. The contract in *Lumley* v. *Gye* was for professional services (to sing at a theatre) and the decision itself was no great extension of the earlier law. But there were suggestions in the judgments of Erle and Crompton, JJ., that an action might lie for inducing the breach of any contract, and this broad principle was in fact affirmed by the Court of Appeal some thirty years later in *Bowen* v. *Hall*.[3] Neither of these decisions was unanimous, and the basis, and even the very existence, of the rule was for long in question. Some doubt was cast on the authority of the decisions by the House of Lords in *Allen* v. *Flood*[4] at the end of the century. But three years later, in *Quinn* v. *Leathem*,[5] the House affirmed the broad principle that interference with any contract is an actionable tort, and suggestions in the earlier cases that malice in the sense of ill-will or spite was the gist of the action were repudiated. 'I think', said Lord Macnaghten,[6] the decision [in *Lumley* v. *Gye*] was right, not on the ground of malicious intention—that was not, I think, the gist of the action

[1] Some writers entitle the tort 'Inducement of Breach of Contract' (Salmond, *Law of Torts* (11th ed. 1953), p. 408) or 'Procuring a Breach of Contract' (Clerk and Lindsell, *Torts* (10th ed. 1947), p. 319). Lord Macnaghten, however, in *Quinn* v. *Leathem* [1901] A.C. 495 at 510, said that it is violation of legal right 'to interfere with contractual relations' and this statement is generally cited in support of the broad principle of liability. Winfield entitles his treatment of the subject 'Interference with Contract' (*Law of Tort* (5th ed. 1950), p. 599) and Roxburgh, J., in *B.M.T.A.* v. *Salvadori* [1949] Ch. 556 at 565, expressed his preference for the term Interference. Jenkins, L.J., and Morris, L.J., in *Thomson* v. *Deakin* [1952] Ch. 646 at 693–694, 702, also seemed to prefer the term Interference with Contract. It would seem to signify the wide scope of the tort more aptly than either 'Inducing' or 'Procuring'.

[2] (1853) 2 E. & B. 216, Coleridge, J., dissenting.

[3] (1881) 6 Q.B.D. 333, Lord Coleridge, C.J., dissenting.

[4] [1898] A.C. 1.

[5] [1901] A.C. 495.

[6] *Ibid.*, at p. 510.

—but on the ground that a violation of legal right committed knowingly is a cause of action, and that it is a violation of legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference'. This broad principle has since been applied on several occasions in cases of interference with contracts which were not contracts of service, or analogous thereto, and the general principle is now unquestioned.[7]

In *Temperton* v. *Russell*,[8] Lord Esher, M.R., expressed himself as unable to see any distinction for the purpose of liability between inducing people to break existing contracts with the plaintiff and inducing people not to enter into contracts or deal with the plaintiff.[9] But where Lord Esher could see no distinction, Lord Herschell, in *Allen* v. *Flood*,[10] saw a chasm, and it is clear, as the result of that case, that the distinction is vital. 'There are', said Lord Watson,[11] 'in my opinion, two grounds only upon which a person who procures the act of another can be made legally responsible for its consequences. In the first place, he will incur liability if he knowingly and for his own ends induces that other person to commit an actionable wrong. In the second place, when the act induced is within the right of the immediate actor, and is therefore not actionable in so far as he is concerned, it may yet be to the detriment of a third party, and in that case, according to the law laid down by the majority in *Lumley* v. *Gye*,[12] the inducer may be held liable if he can be shown to have procured his object by the use of illegal means directed against that third party'. To break a contract is an actionable wrong, and so to procure another to break a contract is itself actionable. As Erle, J., said in *Lumley* v. *Gye*,[13] 'the procurement of the violation of a right is a cause of action in all cases where the violation is an actionable wrong'. But to induce a person not to contract or deal with the plaintiff is to induce

[7] *National Phonograph Co.* v. *Edison Bell Co.* [1908] 1 Ch. 335; *G.W.K. Ltd.* v. *Dunlop* (1926) 42 T.L.R. 376; *Camden Nominees* v. *Forcey* [1940] Ch. 352; *B.M.T.A.* v. *Salvadori* [1949] Ch. 556; *D. C. Thomson & Co.* v. *Deakin* [1952] Ch. 646.

[8] [1893] 1 Q.B. 715.

[9] *Ibid.*, at p. 728.

[10] [1898] A.C. 1 at 121.

[11] *Ibid.*, at p. 96.

[12] The reference to *Lumley* v. *Gye* is clearly a slip: see the judgment of Lord Macnaghten in *Quinn* v. *Leathem* [1901] A.C. 495 at 510.

[13] (1853) 2 E. & B. 216 at 232.

something which is 'within the right of the immediate actor, and is therefore not actionable in so far as he is concerned' with the consequence that the inducer is not liable unless he can be shown to have achieved his object by illegal means.

Interference with contractual relations usually takes the form of directly persuading one of the parties to a contract to break it. But Lord Macnaghten's dictum to the effect that it is a violation of legal right to interfere with contractual relations, which is generally cited in support of the broad principle, suggests that interference with contract may be actionable even though it does not take this form. This was clearly the view of Lord Hewart, C.J., in *G.W.K. Ltd.* v. *Dunlop Rubber Co.*[14] G.W.K. Ltd. were manufacturers of motor cars and had contracted with X that all cars exhibited by the Company should be fitted with tyres of X's manufacture. At an exhibition, the defendants, who also manufactured tyres, and who knew of the contract between G.W.K. Ltd. and X, secretly removed from the G.W.K. cars the tyres manufactured by X and replaced them with tyres of their own manufacture. On the strength of Lord Macnaghten's dictum, Lord Hewart, C.J., held that the defendants had committed an actionable interference with contract which entitled X to substantial damages. G.W.K. Ltd. was also awarded damages against the defendants for trespass to its goods.

Until recently it was generally supposed, on the authority of Lord Macnaghten's dictum and its application in the *G.W.K. Case,* that any intentional interference with contract is actionable unless there is some justification for it. Thus Winfield, in the last edition of his *Textbook,* 1950,[15] states that 'A commits a tort if, without justification, he knowingly interferes with a contract between B and C'. Last year, however, in *D. C. Thomson & Co.* v. *Deakin,*[16] the Court of Appeal, while recognising that liability for interference with contract is not confined to cases where one of the parties is directly persuaded to break it, held that interference with contract is in no case actionable unless the

[14] (1926) 42 T.L.R. 376; the defendant's appeal from Lord Hewart's judgment was dismissed upon terms agreed: (1926) 42 T.L.R. 593.
[15] 5th ed. 1950, at p. 599.
[16] [1952] Ch. 646. Also reported [1952] 2 All E.R. 361, where the Court's discussion of the cases against each of the defendants is reported more fully.

breach is brought about by some act which is in itself unlawful, irrespective of the breach procured. 'Acts of a third party lawful in themselves do not', said Jenkins, L.J.,[17] 'constitute an actionable interference with contractual rights merely because they bring about a breach of contract, even if they were done with the object and intention of bringing about such breach'. 'In this context', held Morris, L.J.,[18] 'the notion of interference involves something wrongful. The breach of contract must be brought about or procured or induced by some act which a man is not entitled to do, which may take the form of direct persuasion to break a contract or the intentional bringing about of a breach by indirect methods involving wrongdoing'.

The facts of *Thomson* v. *Deakin* were as follows. The plaintiffs in the action were a firm of printers and publishers who became involved in a trade dispute with a trade union by the name of Natsopa[19] concerning the plaintiffs' long standing practice of requiring their employees to sign an undertaking not to become members of a union while in their employ. Natsopa resolved to do all in its power to compel the plaintiffs to abandon this practice. Those of the plaintiffs' employees who were in fact members of Natsopa were called out on strike, and general appeals for help in cutting off supplies of raw material to the plaintiffs were sent out to other unions by Briginshaw, the general secretary of Natsopa. Deakin, the general secretary of the Transport and General Workers' Union, in response to Natsopa's appeal, asked Intin, the regional secretary of the T. and G.W.U., to give Natsopa such assistance as he properly could in its dispute with the plaintiffs. Wood, who was trade group secretary of the T. and G.W.U. in Intin's region, telephoned one of the transport supervisors of Bowaters, who supplied the plaintiffs with paper under a contract, telling him that the plaintiffs' works were being picketed and advising him that it would be unwise to send any more paper to them. Intin himself telephoned Bowaters' transport manager and advised him not to ask his drivers, who were members of the T. and G.W.U., to carry paper for the plaintiffs. Bowaters were also informed by one of their shop stewards that the local committee of the union had resolved not to handle

[17] *Ibid.*, at p. 693.
[18] *Ibid.*, at p. 702.
[19] National Society of Operative Printers and Assistants.

newsprint for the plaintiffs. Thereupon Bowaters, not wishing to become embroiled themselves in the dispute, gave no further orders for the delivery of paper to the plaintiffs and wrote to the plaintiffs saying that they were prevented by the action of the trade unions from fulfilling their contract.[20]

The plaintiffs applied for an interlocutory injunction to restrain Briginshaw, Deakin, Intin and Wood from doing any act with a view to causing or procuring breach of their contract with Bowaters. The motion came in the first instance before Upjohn, J.[21] The affidavit evidence of the parties regarding the telephone conversations made by Intin and Wood conflicted, but the learned judge accepted for the purposes of the motion the version of the facts given above and also accepted the evidence of Deakin, Intin and Wood that they had not instructed the members of their union employed by Bowaters to refuse to handle paper for the plaintiffs. Upjohn, J., held that the plaintiffs' claim failed. None of the defendants had directly persuaded Bowaters to break their contract with the plaintiffs, and there could, he held, be no liability for any breach procured indirectly by inducing Bowaters' servants to refuse their services, thus preventing Bowaters from performing their contract, even if it had been shown that the defendants had instructed them not to handle paper for the plaintiffs and that the breach of contract by Bowaters was a necessary and intended consequence of such action.[22]

The Court of Appeal, however, though on the evidence agreeing that the plaintiffs' claim failed, disagreed with Upjohn, J., on the question whether there could be liability for a breach of contract brought about by indirect means. It was argued for the plaintiffs before the Court of Appeal, as it had been before Upjohn, J., that all the plaintiff need show in an action for interference with contract is that the defendant did in fact intentionally bring about the breach of contract complained of, no matter

[20] An injunction was also asked for against the secretary of another union who was alleged to have induced Bowaters' loaders not to handle paper for the plaintiff, but the points of law involved were the same as in the case against Deakin, Intin and Wood, and this aspect of the case is omitted.

[21] [1952] Ch. 646.

[22] *Ibid.*, at p. 663. 'There never was any direct action between the defendants . . . and Bowaters with the object of persuading or causing Bowaters to break their existing contracts with the plaintiffs'.

by what means. Lord Macnaghten's dictum in *Quinn* v. *Leathem*[23] and the decision in the *G.W.K. Case*[24] do, as we have seen, provide some support for such a contention. But the Court of Appeal thought that such a principle would extend the scope of the tort too widely. Though the tort was not confined to cases of direct persuasion to break a contract, as Upjohn, J., thought, nevertheless, it was held, 'the breach of contract complained of must be brought about by some act of a third party . . . which is in itself unlawful'.[25] Direct persuasion to break a contract, the usual form that interference takes, is, the Court held, clearly wrongful in itself.[26] Where, however, the defendant is alleged to have achieved his object, not by persuasion, but by some indirect means, such as by inducing essential servants of one of the parties to withdraw their labour, it must be shown that the means employed were wrongful in themselves.[27] This condition would, the Court held, have been satisfied in *Thomson* v. *Deakin* had the plaintiffs been able to show that the defendants, in order to bring about a breach of the plaintiffs' contract with Bowaters, had induced Bowaters' servants to break their contracts of service.[28] But the evidence fell far short of this, for apart from the fact that it had not been shown that any of the defendants knew of the contract between the plaintiffs and Bowaters, there was no evidence either that the latter's servants had broken their contracts or that any of the defendants had induced them to do so.[29]

In laying down as a general principle that interference with contract is not actionable unless the breach is brought about by an act wrongful in itself, the Court of Appeal has introduced a

[23] [1901] A.C. 495 at 510.
[24] (1926) 42 T.L.R. 376.
[25] [1952] Ch. 646 at 694, *per* Jenkins, L.J.
[26] *Ibid.*, at p. 677, *per* Evershed, M.R.; p. 694, *per* Jenkins, L.J.
[27] *Ibid.*, at p. 694, *per* Jenkins, L.J.; p. 702, *per* Morris, L.J., Evershed, M.R. (at p. 678) put it slightly differently. The defendants would be liable if they brought about the breach by procuring someone to commit an unlawful act, *e.g.* if they procured the servants of Bowaters to break their contracts of service. But to procure Bowaters' servant to break their contracts would itself be a wrongful act, and the reasoning of Jenkins and Morris, L.JJ., who took this point, is neater.
[28] *Ibid.*, at pp. 678, 696, 702.
[29] It was held that in directly approaching Bowaters by telephone and 'advising' them not to send further supplies to the plaintiffs the defendants, Intin and Wood, had not directly induced the breach: [1952] Ch. 646 at 686. The distinction between 'inducement' and 'advice' is discussed later.

wholly new element into this branch of the law, and this would seem to be an appropriate moment to examine the scope of the tort in the modern law and its relation to other torts in the light of the Court of Appeal's ruling.

THE MENTAL ELEMENT IN ACTIONABLE INTERFERENCE

In respect of many interests which are protected by the law of tort, liability is the same whether the defendant acts intentionally or negligently. The interest of a party to a contract in freedom from interference by outsiders is, however, protected only from intentional intervention. So, if a ship on tow is sunk through the negligence of A, the tug owner who is thereby deprived of the benefit of a lucrative towing contract has no remedy against A, even though the tug owner's pecuniary loss might have been foreseen by A.[30] The only exception to this rule would appear to be the old action *per quod servitium amisit,* under which a master can recover damages for the loss of his servant's services if he is deprived of those services by an act which is a tort as against the servant.[31] But the action for loss of services is anomalous in several respects, for the master's remedy is not dependent on the existence of any contract between himself and the servant, and the defendant is liable whether or not he knew or had reason to suspect that the person injured was a servant. A servant, it is clear, has no action against a person who deprives him of his employment by killing or seriously injuring his master.[32]

Since an action lies only for intentional interference with contract, the plaintiff must show that the defendant knew of the contract on the occasion complained of.[33] If the circumstances are such that the defendant must have realised that what he induced another to do would probably involve a breach of contract, proof of actual knowledge may not be essential.[34] In

[30] *Helier* v. *Bennetts* [1911] 1 K.B. 243. See also *Cattle* v. *Stockton Waterworks Co.* (1875) L.R. 10 Q.B. 453. Cf. however *Morrison S.S. Co.* v. *Greystoke Castle* [1947] A.C. 265.

[31] See Salmond, *Law of Torts* (11th ed. 1953), p. 406.

[32] *Best* v. *Samuel Fox & Co.* [1952] A.C. 716 at 731, *per* Lord Goddard.

[33] *White* v. *Riley* [1921] 1 Ch. 1 at 16, *per* Lord Sterndale, M.R.; *British Homophone* v. *Kunz* (1935) 152 L.T. 589 at 592–593; *British Industrial Plastics* v. *Ferguson* (1940) 162 L.T. 313.

[34] *British Industrial Plastics* v. *Ferguson* (1940) 162 L.T. 313 at 315, *per* Lord Russell of Killowen.

Thomson v. *Deakin,* Evershed, M.R.,[35] thought that, in the circumstances of that case, having regard to the way in which business is ordinarily conducted, failure to prove that the defendants actually knew of the contract might not be a bar to relief, but Jenkins, L.J.,[36] adhered to the orthodox view that actual knowledge must be shown, and it is submitted that this is the better view. An acceptance of the Master of the Rolls' view would involve the courts in difficult inquiries into the way business is ordinarily conducted and make the boundaries of the tort even more uncertain than they now are.

Malice, in the sense of ill-will or spite, is not a condition of liability.[37] Motive however is not irrelevant, for in some cases it must be shown not only that the defendant knew of the contract, but that he desired to bring about the breach complained of. Whether or not this is so would seem to depend on the form that the interference takes. If the defendant directly persuades a person to do what he, the defendant, knows will constitute a breach of contract with the plaintiff, the authorities show that it is no defence that the defendant's motive was not to strike at the plaintiff or that he did not desire to bring about a breach of contract.[38] Mere awareness that the conduct induced involves the breach of a contract is sufficient to found liability. But when the breach is procured by some means other than direct persuasion, it seems that there is no liability unless the defendant not only knew that his conduct would bring about the breach, but acted with the purpose and desire of bringing it about.[39] If A detains B with the consequence that B is prevented from performing his contract with C, A will not be liable to C for interference with contract unless his purpose in detaining B was to strike at C. The mere fact that he knows of the contract between B and C and appreciates that its breach will follow will not make him liable.[40] In *Thomson* v. *Deakin* all three members of the Court were of the opinion that the defendants could not have been liable for indirectly procuring a breach unless their

35 [1952] Ch. 646 at 687.
36 *Ibid.*, at p. 697.
37 *South Wales Miners' Federation* v. *Glamorgan Coal Co.* [1905] A.C. 239.
38 *Read* v. *Friendly Society of Stonemasons* [1902] 2 K.B. 732; *Glamorgan Coal Case* [1905] A.C. 239.
39 *Thomson* v. *Deakin* [1952] Ch. 646 at 678, 694–695, 698.
40 *Ibid.*, at p. 698, *per* Jenkins, L.J.

purpose in acting was to bring it about.[41] The mere fact that workmen know that a contract between their employer and one of his customers will inevitably be broken if they go on strike will not entail them in liability towards the customer, even if the breach is brought about by means in themselves unlawful. And it is fairly clear that the defendants would not have been liable in the *G.W.K. Case*[42] for interference with contract had their purpose in removing the tyres not been to strike at X. Motive is thus often an important consideration.

THE FORMS OF ACTIONABLE INTERFERENCE

I now turn to consider the various forms that interference with contract can take. As has been seen, according to the rule laid down by the Court of Appeal in *Thomson* v. *Deakin,* interference with contract is actionable only if the breach is brought about by an act which is wrongful in itself.

1. The usual form that interference takes is direct persuasion. The defendant acts directly upon the mind of one of the parties to the contract, by a promise of reward or a threat of action, so as to induce him to break it. The contract breaker may or may not be a willing party to the breach. Direct persuasion, so the Court held in *Thomson* v. *Deakin,* is in itself a wrongful act. In such a case, 'the result is', said Evershed, M.R., 'for practical purposes, as though in substance he, the intervener, is breaking the contract, although he is not a party to it'.[43]

Where a breach of contract is induced by a threat of action, the authorities show that it is irrelevant whether the action threatened or the threat itself is lawful or unlawful. In two reported cases[44] the Court of Appeal has held defendants liable for inducing breach of contract by threats of lawful action.

It is sometimes doubted whether there can be liability for merely advising a breach of contract. 'To *induce* a breach of contract', says Salmond,[45] 'means to create a reason for breaking it; to *advise* a breach of contract is to point out the reasons

[41] [1952] Ch. 646 at pp. 646, 694–695, 698.
[42] (1926) 42 T.L.R. 376.
[43] [1952] Ch. 646 at 677.
[44] *Temperton* v. *Russell* [1893] 1 Q.B. 715; *Read* v. *Friendly Society of Stonemasons* [1902] 2 K.B. 732.
[45] *Op. cit.*, at p. 411.

which already exist. The former is certainly actionable; the latter is probably innocent'. And in *Thomson* v. *Deakin,* Evershed, M.R., remarked on the difficulty of distinguishing between 'what might be called persuasion and what might be called advice, meaning by the latter a mere statement of, or drawing of the attention of the party addressed to, the state of facts as they were'.[46] But, despite these opinions, it would seem that a mere advisor, in this sense, may sometimes be liable. 'Advice', Simonds, J., has said,[47] 'which is intended to have persuasive effects is not distinguishable from inducement', and in the case in which this statement was made the defendant was held liable for inducing breach of contract though he had not himself created any new reason for the breach.

Those who deny that mere advice can ever give rise to liability appear, with all respect, to confuse the question of causation with the defence of justification. It must be proved in every case that the breach complained of was caused by the defendant's intervention, and this can no doubt more easily be shown where the defendant has himself created new reasons for the breach than where he merely advised the breach. But this is far from saying that breach can never be induced by mere advice. The efficacy of advice depends as much on the relation between the advisor and the person advised and the art of the advisor as on the material arguments that are used. If the relationship is one in which the person advised naturally reposes trust and confidence in the advisor, as in the relationship of child and parent, mere advice is likely to be more effective than an inducement offered by a stranger. Moreover, if the distinction between inducement and advice is accepted, what is to be said of the mere advisor who, though he does not threaten the person advised or actually create new reasons for the breach he advocates, is nevertheless in a position to visit his displeasure upon the person advised should his advice not be followed? If causation can in fact be shown responsibility should follow. It is, of course, necessary to show more than that advice was given and followed. The person who advises a breach of contract should not be liable for any breach that results unless the advice was offered with the purpose of bringing about the breach and in

[46] [1952] Ch. 646 at 686.
[47] *Camden Nominees* v. *Forcey* [1940] Ch. 352 at 366.

such circumstances that the advisor might expect his advice to be acted upon.

Even if a mere advisor can be shown to have caused the breach, he will often be able to excuse himself on grounds of justification. Indeed, the very relationship between the advisor and person advised that gives mere advice such efficacy will more often than not at the same time provide justification for the interference. So, a father may be justified in persuading his daughter to break her engagement to marry a person whom the father honestly thinks unsuitable, not, as Salmond suggests, because mere advice is innocent, but because the relationship between father and daughter justifies advice given in good faith.[48] If the father should in fact be actuated by malice, he should not be able to justify the breach he brings about, while, on the other hand, if he acts in good faith, he should be excused, whether his intervention takes the form of advice or inducement.

2. The old action lay for harbouring as well as enticing another's servant. An action would lie for continuing to employ a servant after knowledge that the servant was bound by contract to serve another.[49] Since *Lumley* v. *Gye*[50] it has been held that the principle of the harbouring cases is applicable to the extended scope of the tort of interference with contract. So, in *De Francesco* v. *Barnum*,[51] it was held to be an actionable tort for the defendant to continue to employ certain dancers after it had come to his knowledge that they had previously engaged themselves to dance for the plaintiff, even though the defendant was ignorant of the earlier contract at the time when he engaged them.

The cases in which the harbouring principle has been applied since *Lumley* v. *Gye* have in fact involved either contracts of service or contracts for services,[52] and it has been suggested that

[48] Viscount Simon, in *Crofter Harris Tweed Ltd.* v. *Veitch* [1942] A.C. 433 at 442–443, thought the father would have justification. He did not deny the effect of parental advice.

[49] *Blake* v. *Lanyon* (1765) 6 T.R. 221. But it is no tort to induce a servant to leave his master when his contract of service expires: *Nichol* v. *Martyn* (1799) 2 Esp. 732.

[50] (1853) 2 E. & B. 216.

[51] (1890) 45 Ch.D. 43. See also *Wilkins* v. *Weaver* (1915) 84 L.J.Ch. 929; *Smithies* v. *National Association of Operative Plasterers* [1909] 1 K.B. 310.

[52] See authorities cited in note 51 above.

the principle does not extend beyond contracts of such a nature.[53] But in *Thomson* v. *Deakin,* Jenkins, L.J.,[54] thought that, as a general principle, any inconsistent dealing between a third party and a contract breaker after the former learns of the existence of the contract would be an actionable interference with contract.

If such is indeed the law, the results are startling. If a manufacturer contracts with X to sell him the whole output of his factory each month, and then later contracts with Y, who is ignorant of the first contract, to sell him a portion of his output each month, it would, on this principle, be an actionable tort for Y to accept any further deliveries from the manufacturer after he learns of the latter's contract with X. Yet the second contract is clearly a valid one,[55] and it would thus be an actionable tort to accept the performance of a valid contract. The first contract is not one that the courts will specifically enforce, and, as between the parties, the only remedy for breach is an action for damages. Such being the case, it would seem somewhat illogical to permit the aggrieved promisee to proceed against third parties who accept in performance of valid contracts the benefit promised to him. Where the first contract is one which, by reason of the remedy of specific performance, confers a proprietary interest on a promisee, that interest will indeed generally prevail over any rights acquired under a subsequent inconsistent contract. But this result follows from the nature of proprietary interests and from the maxim *nemo dat quod non habet,* and not by reason of the inconsistent dealing being the tort of interference with contract. One may venture to doubt whether the courts will in fact approve the general principle suggested by Jenkins, L.J., at least when a second

[53] Batt, *Master and Servant* (4th ed. 1950), p. 312. Roxburgh, J., in *B.M.T.A.* v. *Salvadori* [1949] Ch. 556 at 565, thought it possible that Lord Macnaghten, in using the word 'interfere', may have intended to make some reduction of the scope of the tort suggested by cases like *Blake* v. *Lanyon* and *De Francesco* v. *Barnum.* He thought that the word 'interfere' predicated 'active association of some kind with the breach'.

[54] [1952] Ch. 646 at 694.

[55] The question of the validity of the second contract has been examined by Professor Lauterpacht: 'Contracts to break a contract' (1936) 52 L.Q.R. 494. His conclusion is that it is not invalid unless both parties knew at the time of the earlier inconsistent contract. This was also the conclusion of du Parcq, J., in *British Homophone Co.* v. *Kunz* (1935) 152 L.T. 589 at 592–593.

inconsistent contract has been concluded in ignorance of the first, and the defendant is merely accepting the benefit of the second contract.

Even where the defendant has concluded no valid contract inconsistent with an earlier one, but merely continues to deal with a contract breaker after learning of the inconsistent contract, the rule that inconsistent dealing constitutes the tort of interference with contract leads to results which are difficult to reconcile with those reached in other branches of the law. The courts will never decree the specific performance of a contract of service nor restrain by injunction the breach of a negative covenant in a contract of service when to do so would indirectly compel the party enjoined to perform it.[56] According to the principle of inconsistent dealing, however, any person who employs or continues to employ a servant after it has come to his knowledge that the servant is bound by contract to serve another commits an actionable tort. It has been held that an injunction will not be granted against a person who entices or harbours another's servant, on the ground that a series of injunctions against successive employers would in effect compel the servant to perform his original contract,[57] but successive employers are nevertheless liable in damages and it may be questioned whether such liability might not in fact prevent a servant from obtaining alternative employment, should his original employer be minded to pursue him.

3. In *Thomson* v. *Deakin,* as has been seen, the Court of Appeal held that an actionable interference with contract might be committed otherwise than by direct persuasion provided the breach is brought about by an act which is itself wrongful. The Court thought that an actionable interference would be committed if the defendant, with the intention of bringing about a breach of contract, were to detain one of the parties so as to prevent him from performing it.[58] The result would be the same, the Court thought, if the performance of the contract were prevented indirectly by intervention wrongful in itself, such as where one of the parties is wrongfully deprived of an essential tool or is wrongfully deprived of the services of essential

[56] *Whitwood Chemical Co.* v. *Hardman* [1891] 2 Ch. 416.
[57] *Rely-A-Bell Co.* v. *Eisler* [1926] Ch. 609.
[58] [1952] Ch. 646 at 678, *per* Evershed, M.R.; at 694–695, *per* Jenkins, L.J.

servants.[59] Jenkins, L.J., stressed however that it must be shown that the breach complained of was a necessary consequence of the defendant's intervention.[60] If, he pointed out, A induces B, who is C's lorry driver, to refuse in breach of his contract of service to carry goods which C is under contract to deliver to D, and does so with the intention of bringing about a breach of C's contract with D, A will not be liable to D for procuring breach of contract unless no other means of delivering the goods were available to C. If C could have hired another driver to take the place of B or made use of some other delivery service, the breach of his contract with D will not be the necessary consequence of A's intervention.

A remarkable feature of the decision in *Thomson* v. *Deakin,* and one that appears to have gone unnoticed, is that the Court limited liability for breach procured otherwise than by persuasion to situations in which a defendant would be liable for injury done to the plaintiff even though no breach of contract has been procured. For even when no breach of contract has been procured the intervener will be liable 'if he can be shown to have procured his object by the use of illegal means'.[61] Thus, in *National Phonograph Co.* v. *Edison Bell Co.,*[62] the Court of Appeal held that if A, by fraud practised on B, induces him to do an act injurious to C, C has a cause of action against A even though no breach of contract may have been induced. The illegal means may take the form of violence or the threat of violence, as in the old cases of *Garret* v. *Taylor*[63] and *Tarleton* v. *M'Gawley,*[64] or may take the form of a conspiracy the predominant purpose of which is to injure the plaintiff.[65] In an Irish case[66] it has been held that illegal means may consist in threats to call workmen out on strike in breach of their contracts of service, and this is consistent with the judgments of the majority in *Allen* v. *Flood.* Both Lord Watson and Lord Herschell in that case emphasised the fact that the ironworkers,

[59] *Ibid.,* at pp. 678, 696, 702.
[60] *Ibid.,* at p. 699.
[61] *Allen* v. *Flood* (1898) A.C. 1 at 96, *per* Lord Watson. See Winfield, *op. cit.,* p. 604 *et seq.*
[62] [1908] 1 Ch. 335.
[63] (1620) Cro.Jac. 567.
[64] (1793) 1 Peake 270.
[65] *Quinn* v. *Leathem* [1901] A.C. 495, as explained by the House of Lords in *Crofter Harris Tweed* v. *Veitch* [1942] A.C. 433.
[66] *Cooper* v. *Millea* [1938] I.R. 749.

who objected to the employment of the plaintiffs, were free to leave their work at any time,[67] and Lord Watson, whose judgment was said in *Quinn* v. *Leathem* to represent best the views of the majority, accepted that any person who procured the dismissal of the plaintiffs would be liable if unlawful means were employed.[68]

It would seem therefore that the defendants could have been liable in *Thomson* v. *Deakin* had they induced Bowaters' servants not to handle paper for the plaintiffs in breach of their contracts of service, without any need to show that a breach of contract between Bowaters and the plaintiffs had been brought about. It is unfortunate, to say the least, that the Court did not consider the question of liability except in relation to the tort of interference with contract. Had the broader issues been considered, the Court might not have deemed it worth while to concede grudgingly the possibility of liability for interference with contract in circumstances where liability would appear to arise upon a broader principle irrespective of whether a breach of contract has or has not been procured.

The decision is also open to criticism in another respect. A person who induces another to break a contract by threats is liable whether the action threatened or the threat itself is lawful or unlawful.[69] Yet the Court of Appeal has now held that where a breach is brought about by such indirect means as inducing the servants of one of the parties to withdraw their labour, there is no liability unless the servants are induced to break their contracts of service or the intervention is in some other respect wrongful in itself. That there should be liability for a breach when procured by a threat of action, but not when procured by the action itself, is curious when we consider the law relating to threats where no breach of contract is procured. In the latter instance, it is clear that 'threats to do or abstain from doing a perfectly lawful act cannot . . . be wrongful'.[70] One would expect therefore, when a breach of contract has been procured, liability to be the same whether the breach is brought about by

[67] [1898] A.C. 1 at 99, 129.
[68] *Ibid.*, at p. 97.
[69] *Temperton* v. *Russell* [1893] 1 Q.B. 715; *Read* v. *Friendly Society of Stonemasons* [1902] 2 K.B. 732.
[70] *Sorrell* v. *Smith* [1925] A.C. 700 at 747, *per* Lord Buckmaster. See also *Hodges* v. *Webb* [1920] 2 Ch. 70, and *Ware and De Freville* v. *Motor Trade Association* [1921] 3 K.B. 40.

a threat of action or by the action itself. As Peterson, J., once remarked in a judgment that was later approved of by high authority,[71] 'it would seem to be a very strange inconsequence that while workmen can cease work without the possibility of legal objection, they cannot in a body or by one or more of themselves, or by one of the officials of their Union, inform the employers of the fact that they propose to cease work, and of their reasons for doing so, without the risk to the communicant of being sued for using threats or coercion'. Yet in *Thomson* v. *Deakin* this is the very inconsequence arrived at. In a situation like that in *Thomson* v. *Deakin* trade unions are encouraged to take direct action, rather than to negotiate, in order to achieve their objects.

THE DEFENCE OF JUSTIFICATION

It has always been recognised that interference with contract may in certain circumstances be justified.[72] But the authorities are scanty and confusing, and it is uncertain how far the defence extends and what its basis is. It is clear that interference is not justified merely by reason of the fact that the defendants acted without ill-will towards the plaintiff and in honest furtherance of their own interests or the interests of the association of which they are officials or members.[73] According to the prevailing view, interference may be justified when the defendant was acting under a moral duty in intervening.[74] Thus it is generally conceded that a father would on this ground be justified in persuading his daughter to break an undesirable engagement.[75] In *Brimelow* v. *Casson*,[76] the only case in English law in which the defence of justification has succeeded, Russell, J., held that the defendants, who were members of a theatrical Joint Protection

[71] *Hodges* v. *Webb* [1920] 2 Ch. 70 at 88.

[72] *Quinn* v. *Leathem* [1901] A.C. 495; *Glamorgan Coal Case* [1905] A.C. 239; *Read* v. *Friendly Society of Stonemasons* [1902] 2 K.B. 732; *Smithies* v. *National Association of Operative Plasterers* [1909] 1 K.B. 310.

[73] *Read's Case* [1902] 2 K.B. 732; *Glamorgan Coal Case* [1905] A.C. 239. Cf. the rule in conspiracy, where honest furtherance of self-interest excuses a combination to injure so long as means wrongful in themselves are not resorted to; *Crofter Harris Tweed* v. *Veitch* [1942] A.C. 433.

[74] *Glamorgan Coal Case* [1905] A.C. 239; *De Jetley Marks* v. *Greenwood* [1936] 1 All E.R. 863.

[75] *Crofter Harris Tweed* v. *Veitch* [1942] A.C. 433 at 442–443, *per* Viscount Simon.

[76] [1924] 1 Ch. 302.

Committee, were acting under a moral duty both to their profession and to the public in inducing certain theatre owners to break their contracts to allow the plaintiff the use of their theatres, it having been shown that the plaintiff was paying his chorus girls such a low wage that some of them were driven to supplement it by prostitution. Whether or not there is a moral duty to intervene depends on the subjective opinion of the judges, but it is obvious that, even on the most liberal view of moral duty, interference can seldom be justified on this ground.

It is also said that a person will be justified in inducing breach of contract by another when his purpose in doing so is to enforce an earlier and inconsistent contract between himself and that other.[77] 'If the contract between B and C is one which B could not make consistently with his preceding contractual obligations towards A, A may not only induce him to break it, but may invoke the assistance of a Court of Justice to make him break it'.[78] But the breach by X of his contract with Y will not justify Y in inducing Z to break an independent contract with X in order to coerce X to abide by his contract.[79] It has been suggested that 'since the rules of a trade union constitute a valid contract between the members, though not directly enforceable, a trade union may be justified in inducing breach of a contract entered into by a member which is inconsistent with the rules'.[80]

Though there is no suggestion in the cases that interference is justified otherwise than on grounds of moral duty or in defence of superior legal rights, other situations may be imagined in which justification would probably be held to exist. Thus, a man should be regarded as justified in proposing marriage to a woman whom he knows to be engaged to another, and yet it cannot be said that he is under any moral duty to do so. If justification exists in such circumstances, it is because of the clear public interest in marriage being founded on the free consent of the parties and not on any sense of obligation that arises from

[77] *Read* v. *Friendly Society of Stonemasons* [1902] 2 K.B. 88 at 95; *Smithies* v. *National Association of Operative Plasterers* [1909] 1 K.B. 310; *Pratt* v. *British Medical Association* [1919] 1 K.B. 244 at 265.

[78] *Smithies* v. *National Association of Operative Plasterers* [1909] 1 K.B. 310 at 337, *per* Buckley, L.J. The actual decision in *Read's Case* [1902] 2 K.B. 88 is difficult to reconcile with this rule. See Kennedy and Finkelman, *The Right to Trade* (1933), p. 73.

[79] [1909] 1 K.B. 310 at 341, *per* Kennedy, L.J.

[80] Citrine, *Trade Union Law* (1950), p. 445.

the contract of engagement. It is also unlikely that English courts would ever go as far as some American courts have gone in restraining union officials from soliciting workmen to join a union when it is a term of their contracts of service that they will not do so.[81] Yet self-interest, or possibly public interest, is the only possible ground for justification in such a case. In the United States the courts have set their face against allowing business men to establish quasi-monopolies by means of the tort of interference with contract, so that a manufacturer or supplier who makes it a term of the contracts by which he sells his goods to retailers that the latter should not sell any competing line, cannot restrain business competitors from attempting to sell their own products to his customers by publicising the terms of his contracts and the identity of those to whom he sells.[82] It seems probable that the English courts would hold likewise.

It would seem therefore that the furtherance of one's own interests, economic or otherwise, may sometimes provide justification for interference with contract. This would seem to be so only when it is clearly in the public interest also that interference should not give rise to liability. We are sadly in need of an authoritative statement on this matter.

If the defendant resorts to unlawful means in order to procure the breach there can be no justification. Action unlawful in itself cannot be justified.[83] Justification at common law can only arise when the breach is procured by means which would give rise to no tortious liability if no breach of contract were in fact procured, *viz.*, when the breach is procured by direct persuasion or by inconsistent dealing. There could, it seems, be no justification when the breach is procured indirectly by inducing the servants of one of the contracting parties to break their contracts of service, since, as we have seen, such conduct would be actionable even if no breach of contract is procured. The question of common law justification was not discussed in *Thomson* v. *Deakin*.

81 *Hitchman Coal & Coke Co.* v. *Mitchell* (1917) 245 U.S. 229. In English law trade union officials are in any case protected by section 3 of the Trades Disputes Act, 1906.

82 See Sayre, 'Inducing Breach of Contract', (1923) 36 *H.L.R.*, p. 663, at p. 688.

83 Winfield, *op. cit.*, p. 604; *Quinn* v. *Leathem* [1901] A.C. 495; *National Phonograph Co.* v. *Edison Bell Co.* [1908] 1 Ch. 335; *Conway* v. *Wade* [1909] A.C. 506.

A special statutory immunity from liability for interference with contract was created by section 3 of the Trades Disputes Act, 1906. By virtue of that section, 'An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business or employment of some other person, or with the right of some other person to dispose of his capital or labour as he wills'.

The effect of the first limb of the section is clearly to negative liability for inducing workmen to break their contracts of service, so long as this is done in contemplation or furtherance of a trade dispute. It has however been held that since the section provides that an act shall not be actionable 'on the ground *only* that it induces some other person to break a contract of employment', it does not provide immunity for breaches procured by illegal means, such as by illegal threats.[84] In *Riordan* v. *Butler*,[85] an Irish case, it was held that the section conferred no protection on the defendants, a number of workmen, who had procured the dismissal of the plaintiff by threatening to stop work in breach of contract, since the plaintiff's dismissal had been procured by unlawful means. It appears therefore that the immunity provided by section 3 is, like justification at common law, confined to cases where the breach is procured by direct persuasion, in which proof that a contract has been broken is an essential condition of liability.

The effect of the second limb of the section, which provides that no action shall lie on the ground only that there is an interference with trade, etc., is uncertain. The possibility of its providing a defence to the breach complained of in *Thomson* v. *Deakin*, had the plaintiffs made out a prima facie case, was briefly discussed by the Master of the Rolls.[86] His view, avowedly obiter but for which support can be found elsewhere,[87] was that the second limb would not excuse interference with a contract like that of the plaintiffs in *Thomson* v. *Deakin*. He thought

[84] *Conway* v. *Wade* [1909] A.C. 506 at 511, *per* Lord Loreburn, L.C.
[85] [1940] I.R. 347.
[86] [1952] Ch. 646 at 687–689.
[87] Russell, J., in *Brimelow* v. *Casson* [1924] Ch. 302 at 314; Halsbury's *Laws of England* (Hailsham ed.), Vol. 32, pp. 521, 522; Citrine, *Trade Union Law*, p. 453.

that the words 'of employment' in the first limb would be otiose if one were to interpret the words 'interference with trade, business or employment' as covering interference with any contract. The Master of the Rolls also thought that, though the first limb of the section would have provided the defendants in *Thomson* v. *Deakin* with a complete defence to any action for inducing Bowaters' servants to leave their employment in breach of their contracts of service, the defendants would still have committed an unlawful act, even though not actionable, and so might have been liable for procuring a breach of contract on the part of Bowaters by *unlawful* means. He did not consider the question whether, had the breach complained of been within the scope of the section, the use of unlawful means to bring about the breach would, by virtue of the word 'only', have excluded the operation of the section. If, as the cases on the first limb of the section suggest, no immunity extends to acts of interference in themselves wrongful, then it seems that the section can have no operation at all when a breach is indirectly procured, since a breach thus procured is not actionable at common law unless brought about by means in themselves unlawful.

This brief survey shows that there are many difficulties in the tort of interference with contract which require elucidation. It has not been possible in the space available to deal with some of the lesser problems, such as whether interference is actionable which frustrates a contract or otherwise excuses the parties from fulfilling its original terms. If one may venture an opinion in conclusion, it is that, assuming all legal restraint to be evil unless justified by the objects it achieves, a wise legislator, looking back over the history of the tort of interference with contract in its modern form, might doubt whether the results achieved justify the uncertainty and complexity of the tort. We seem to have fashioned a large and unwieldy hammer to crack a very small nut.

DIVORCE IN THE ENGLISH CONFLICT OF LAWS

S. Prevezer

In England alone, some thirty thousand marriages are dissolved by the courts each year.[1] Two wars have left their mark on morals and standards of behaviour, and divorce has developed rapidly in the present century both as a social and as a legal problem.[2] It has also widened its effect territorially: travel today is comparatively simple and inexpensive, and the number of marriages involving foreign nationality, residence or domicile has greatly increased in recent years. Unfortunately, the attitude of States towards divorce varies widely, determined as it is by different religious and social considerations, and this has resulted in a regrettable lack of harmony either of ends or means. Some States deny the possibility of divorce[3] and others turn it to commercial advantage.[4] Some regard adultery as the sole ground for granting a decree,[5] whilst others recognise mutual incompatibility as sufficient.[6] In Soviet Russia, for example, divorce is a matter of judicial discretion, though the judges have 'to be psychologists with training in the political aims of the leadership and with great tact, seeking to find the key to marital peace'.[7] In South Carolina it was impossible to obtain a divorce until 1949, whereas some American States have long assumed jurisdiction based on several weeks' residence,[8] though others still require

[1] The most recent authoritative figures can be found in the Registrar General's Statistical Review of England and Wales for the Five Years 1946–1950, Text, Civil (1954).

[2] 'In terms of numbers, the effect of the First World War was to cause fifteen hundred more petitions to be filed each year and of the Second World War to cause twenty thousand more petitions. . . '. (*Ibid.*, p. 57.) The effect of the Legal Aid and Advice Act, 1949, is clearly not to be discounted today.

[3] *E.g.*, Spain, Italy, Eire and the Argentine.

[4] Several American States are notorious in this respect *e.g.*, Nevada and Florida.

[5] *E.g.*, New York.

[6] In many American States, in France, in Czechoslovakia and several other countries, the grounds for divorce are apparently still capable of considerable expansion.

[7] Hazard, *Law and Social Change in the U.S.S.R.* (1953), p. 270.

[8] Nevada (six weeks), Florida (thirteen weeks).

three years.[9] In most countries, dissolution of marriage is a civil, judicial process. In some, however, it involves religious or administrative ceremonies and it has, indeed, been recently reported that the validity of a decree granted in England during the last war by a Government in exile is to be challenged in the English Divorce Court.[10]

Until a few years ago it was impossible to reconcile even in theory the views of the English-speaking world. In England, Scotland and the Dominions, divorce was exclusively referred to the joint domicile of the parties at the date of the petition, since this supposedly represented the community to which they belonged and by which the incidents of marriage, including the right of divorce, should be governed. In the United States, on the other hand, in accordance with the belief that if a marriage is dead it should be quickly and decently buried, the parties themselves have been able to determine to a far greater degree the appropriate funeral rites, and in effect it is their conduct subsequent to the break-up of the marriage which chooses the laws governing its dissolution. The rights of the State in which they once made their home need not resolve the issue, as was the original intention in English law, and they can acquire separate domiciles and invoke different systems of law, whose decrees are usually entitled to recognition in other States of the Union.[11] It is because our common law has proved inadequate and unrealistic that the United Kingdom and Dominion Parliaments have chosen compromise solutions to problems of law and jurisdiction and their courts a more liberal answer to questions of recognition.[12] Though different connecting factors are still employed, the attitude in England and the Commonwealth today is in general not fundamentally dissimilar from that in the United States.

At one time, divorce presented few difficulties in the English Conflict of Laws. A hundred years ago, it could be obtained in England only by special Act of Parliament.[13] Marriage was

[9] *E.g.*, Connecticutt.

[10] *The Evening Standard*, September 29, 1953.

[11] See further Morris, 'The Recognition of American Divorces in England' (1952) 29 *British Year Book of International Law*, p. 283 at pp. 290–299.

[12] *E.g.*, *Armitage* v. *Att.-Gen.* [1906] P. 135; *Travers* v. *Holley* [1953] P. 246.

[13] Divorce *a mensa et thoro*, amounting today to judicial separation, had long been possible in the Ecclesiastical Courts.

sacrosanct for all but the privileged few, and insoluble differences of domestic life generally resulted in prolonged suffering, separation or adultery. For those who found that the burdens of marriage outweighed the bliss, there was no satisfactory remedy, and the courts, themselves exercising no divorce jurisdiction, apparently refused to recognise that of a foreign court when it purported to dissolve a marriage which had been celebrated in England.[14] Following the establishment, however, of a Divorce Court in 1857,[15] and due to many fresh factors, including the growing movement towards female emancipation and the subsequent, gradual and not entirely coincidental decline in conventional standards of respectability, problems of divorce involving a conflict of laws soon became common. To solve these, the judges turned, after some hesitation, to the concept of domicile,[16] to which they proceeded to refer indiscriminately questions of law, jurisdiction and recognition, and it is only recently that Parliament has seen fit to mitigate some of the unnecessary hardship caused by this regrettable and arbitrary practice. It will be the aim of this paper to consider this change of approach and its merits and defects.

DIVORCE AT COMMON LAW

With regard to law and jurisdiction, the English common law is governed by two rules, both, paradoxically, established by Privy Council cases, deciding in the one instance on the Roman-Dutch law of Ceylon,[17] and in the other, on the law of the

[14] *Lolley's Case* (1812) 2 Cl. & F. 567 (N.), but see Lord Westbury's judgment in *Shaw* v. *Gould* (1868) L.R. 3 H.L. 55. See too Cheshire, *Private International Law*, 4th ed. at p. 367 and 'The International Validity of Divorces' (1945) 61 *L.Q.R.*, p. 352 at p. 354.

[15] 20 & 21 Vict., c. 85 (Matrimonial Causes Act).

[16] Shortly after this paper was read, the First Report of the Private International Law Committee, appointed by the Lord Chancellor on September 18, 1952, was published (Cmd. 9068). The Report is primarily concerned with the serious defects in the present definition of domicile employed by the English courts and makes many suggestions similar to those advocated in this paper. The Committee's criticism is more practical than theoretical and turns to a considerable degree on the difficulties of ascertaining a man's subjective intentions and of 'reaching certainty in matters of domicile in the absence of any decision by a competent court'. Unfortunately the Committee's proposals have appeared too late to be incorporated or commented on in the text of this paper but, wherever possible and practicable, they are referred to in the footnotes.

[17] *Le Mesurier* v. *Le Mesurier* [1895] A.C. 517.

Canadian province of Alberta[18]: (1) divorce, being primarily a matter of status and not contract, is determinable by the court of the current common domicile, generally applying the *lex fori*. The nationality or residence of the parties,[19] the country in which they were married[20] or domiciled before the petition[21] or where the matrimonial offence was committed,[22] are all of no consequence; (2) the domicile of the wife, so long as she is a wife, is that of her husband, and it is immaterial that she has been awarded a separation decree,[23] that her spouse continues to live in open adultery or that he has apparently not the slightest intention either of challenging the jurisdiction of the court or of contesting the suit.[24] The argument in favour of these rules is perhaps best expounded in the celebrated dictum of Lord Penzance in *Wilson* v. *Wilson*[25]: 'Different communities have different views and laws respecting matrimonial obligations and a different estimate of the causes which should justify divorce. It is both just and reasonable therefore that the differences of married people should be adjusted in accordance with the laws of the community to which they belong and dealt with by the tribunals which alone can administer those laws. An honest adherence to this principle, moreover, will preclude the scandal which arises when a man and woman are held to be man and wife in one country and strangers in another'.

Unfortunately, this solution is neither as attractive nor as simple as Lord Penzance makes it appear, and in practice it has failed to preclude the scandal of the 'limping marriage' and its consequent problems of bigamy and illegitimacy. Where the parties have separated and are living in different countries, can it nevertheless be said that they belong to any one community? Is it preferable, as has been thought in the United States, to

18 *Att.-Gen. for Alberta* v. *Cook* [1926] A.C. 444.
19 *Le Mesurier* v. *Le Mesurier* [1895] A.C. 517.
20 *Ratcliff* v. *Ratcliff* (1859) 1 Sw. & Tr. 467.
21 *Goulder* v. *Goulder* [1892] P. 240 at 243.
22 *Wilson* v. *Wilson* (1872) L.R. 2 P. & D. 435.
23 *Att.-Gen. for Alberta* v. *Cook* [1926] A.C. 444. This case has invoked almost unanimous criticism, and the Report of the Private International Law Committee, although it approves the principle of unity of domicile, wisely suggests that it be relaxed where the wife has been judicially separated from her husband, since the relations of the spouses have 'been investigated and put on a new basis by the decree of a court which has considered the whole matrimonial history'.
24 *Herd* v. *Herd* [1936] P. 205.
25 (1872) L.R. 2 P. & D. 435.

recognise the interests of the communities in which they have made their new homes[26] or, as was the original intention of the common law, to refer questions of divorce to the last system of law which governed the marriage, the law of the community to which both parties last belonged? The latter course, before it can be adopted, requires a connecting factor indicating a 'proper law' of divorce and the concept of domicile, as developed by the English courts, has failed to serve this purpose. Furthermore, if only one system of law is to be applied in divorce, does it follow that jurisdiction should be confined to the courts of which that law is the *lex fori*? Choice of law and choice of jurisdiction present different problems and, theoretically at least, it should be irrelevant which court exercises jurisdiction provided the correct law is applied. This is obviously difficult in practice, but it is wrong to assume, as Parliament has done, that to discard the system of limiting jurisdiction to the courts of one country need necessarily entail the rejection of that principle of a single law of divorce which underlies the common law.

Choice of Law at Common Law

The *lex domicilii* was originally applied because it approximated to what might now be called the 'proper law' of divorce. It represented 'the technically pre-eminent headquarters'[27] of the parties. It has obvious advantages over the National Law of Mancini and the Code Napoléon, which have been so widely adopted on the Continent: though it may fail to take into account the somewhat mythical hereditary factors of race and temperament, and even this cannot be said of the domicile of origin, it is designed to respect the primary concern of the state in which the parties established their home and it avoids difficulties of dual nationality, stateless persons and intermediate change of sovereignty. Moreover, nationality is of little use in such countries as Great Britain, Canada, Australia and the United States where it would fail to indicate which of more than one municipal system should apply.

The principal defect of the present domicile doctrine is that in fact it often fails to give effect to the interests of the com-

[26] Though in practice this view is often so abused as to make those interests almost purely fictitious.

[27] *Williamson* v. *Osenton*, 232 U.S. 34 Sup. 442 (1914), *per* Holmes, J.

munity to which the parties last belonged. Before 1895 jurisdiction was determined by the settled residence and home of the parties.[28] But when the courts adopted the views of the Judicial Committee in *Le Mesurier* v. *Le Mesurier*,[29] establishing domicile as the connecting factor in divorce, the consequences of the distortions which the concept had undergone about the 1860s[30] primarily in the context of succession proved disastrous to the idea of a 'proper law' of divorce. Unfortunately these failings have been still further exaggerated by the more recent decisions of the House of Lords in *Winans* v. *Att.-Gen.*[31] and *Ramsey* v. *Liverpool Royal Infirmary*[32] which have made it so difficult to acquire a domicile of choice, entailing an *animus semper manendi* and often ignoring the factum of long and settled residence, and to forsake the totally superfluous domicile of origin, that they have defeated the very purpose of employing domicile as the connecting factor in divorce. Instead of adopting a comparatively flexible though nonetheless ascertainable definition, such as habitual residence,[33] their Lordships, by insisting on the factum of residence coupled with the animus of permanent residence, were forced to bridge the gap which would inevitably occur when a domicile of choice which could easily be forsaken was only replaceable in extreme circumstances by a new domicile. The very *raison d'être* of the domicile of origin and its unwarranted importance depend on the harshness of the rules relating to domicile of choice, and although in the United States no difference is usually made between domicile of origin

[28] *Niboyet* v. *Niboyet* (1878) 4 P.D. 1.
[29] [1895] A.C. 517.
[30] *E.g.*, *Jopp* v. *Wood* (1865) 4 De G.J. & S. 616; *Bell* v. *Kennedy* (1868) L.R. 1 Sc. & Div. 307; *Udny* v. *Udny* (1869) L.R. 1 Sc. & Div. 441; *Shaw* v. *Gould* (1865) L.R. 3 H.L. 55.
[31] [1904] A.C. 287.
[32] [1930] A.C. 588. Both cases are carefully examined in the 1954 Report and provide the basis of the Committee's criticism.
[33] Though this definition is approved in the Draft Convention proposed at a Conference at The Hague in October, 1951 'to regulate conflicts between the law of nationality and the law of the domicile', it is rejected in the 1954 Report as entailing 'consequences quite unacceptable to public opinion' and 'not in harmony with the temper of the British people'. This criticism may appear to some to place inordinate emphasis on national considerations and subjective intentions. The Committee recommends retaining the intention of permanent residence but suggests certain presumptions to assist the courts in ascertaining whether that intention is present. It is clearly debatable whether this goes to the root of the problem, and many will prefer the Continental view and regret its rejection by the Committee.

and domicile of choice with regard to acquisition,[34] the English presumption against change from the domicile of origin, dependent, as has been said, 'on the attachment which every one feels for his native land',[35] has often resulted in illogical and unsatisfactory conclusions in which the alleged attachment has proved to be not for one's own native land but for that of one's forefathers. Lord Macnaghten's description of the domicile of origin, 'its character . . . more enduring, its hold stronger and less easily shaken off',[36] carries sentiment to unfortunate limits. It is surely less illogical to permit one's last domicile of choice to continue temporarily, justified by some past connection, than to revert to a domicile which is all too often of no connection. To respect a man's intention to forsake his domicile is to ignore the objective considerations which should prevail in questions of status. The doctrine of reverter has 'lost its meaning in an age of migratory populations',[37] and refutes the principle that a domicile once legally acquired is retained until a new domicile is secured and that in the acquisition of such new domicile both the fact and the intention must concur.[38] It is possible to 'have a centre of gravity'[39] and one's normal home in a country without needing or intending to spend one's last days there. The fact, for example, that in *Jopp* v. *Wood*,[40] John Smith went to India to make his fortune and intended to return ultimately to his native Scotland, which in fact he failed to do, should not have outweighed the interests of the country of adoption, accruing from his twenty-five years' residence, to determine questions relating to his status. Even if domicile had been suitable to determine his succession at his death, his tenuous connection with Scotland during his later lifetime could hardly have justified, if the need then arose, either the application of Scots law to possible questions of divorce or his enforced recourse to the Scottish courts. Why, adopting the facts of *Re Patience*,[41] should the law of his native country which Colonel Patience had

[34] Cf. Goodrich, *Conflict of Laws* (1949), 3rd ed., p. 58.
[35] Cf. *Moorhouse* v. *Lord* (1863) 10 H.L. Cas. 272.
[36] *Winans* v. *Att.-Gen.* [1904] A.C. 287 at 290.
[37] Wolff, *Private International Law* (2nd ed. 1950), p. 109.
[38] Cf. Goodrich, *op. cit.*, at p. 60; Beale, *The Conflict of Laws*, Vol. 1 (1935), p. 181; *Restatement of the Conflict of Laws* (1934), § 23.
[39] *Att.-Gen.* v. *Rowe* (1862) 31 L.J.Ex. 31, *per* Baron Bramwell.
[40] (1865) 4 De G.J. & S. 616.
[41] (1885) 29 Ch.D. 976.

left seventy-two years before his death rule, if necessary, not merely the succession to his movables and the form of his will, but the possible validity of his divorce and the legitimacy of his children?

Some indication of the technical and artificial nature of the concept, as still interpreted by the English courts, may be gathered from the recent case of *Harrison* v. *Harrison*.[42] The respondent was born in England of English parents who emigrated to South Australia when he was 18. His domicile of origin was English. He remained here for some time after their departure, then went to New Zealand where, at the age of 20, he married the petitioner. They decided to make their permanent home in New Zealand but, whilst Harrison was still a minor, came to England on a temporary visit. In this country he came of age and shortly afterwards his wife filed her petition for divorce on the grounds of cruelty. Although the action was undefended, Collingwood, J., had first to decide whether he had jurisdiction to hear it, which meant in fact, since no question of statutory residence arose, whether the parties were domiciled here. By English law, Harrison had acquired a domicile of dependence in South Australia when his parents emigrated there. At 21 he had become capable of acquiring an independent domicile of choice and of abandoning his domicile in South Australia and it was held that, since he had the requisite *animus relinquendi,* he had succeeded in abandoning his Australian domicile when he came of age. As he had not subsequently satisfied the requirement of residence in New Zealand simultaneously with an *animus semper manendi,* however, he had not acquired a domicile of choice there, his English domicile of origin revived, the Court therefore had jurisdiction, and the learned judge could grant a decree.

Having regard to the English meaning of domicile, the decision is interesting though not extraordinary and, on the facts, since the petition was undefended and jurisdiction allowed, no injustice was caused. But when one considers that the respondent's domicile was meant to represent the community to which he belonged and which was most concerned in questions of status, the whole matter appears rather ludicrous. From 18 to 21 he was domiciled in South Australia. He had never been there

[42] [1953] 1 W.L.R. 865.

nor, apparently, had he the slightest intention of settling there. When he went to New Zealand and married, both he *and* his wife were domiciled in South Australia. She had no connection whatsoever with that State and his was most indirect. Yet, subject to *Armitage* v. *Att.-Gen.*,[43] and to such possible foreign statutory provisions as would be recognised by the English courts,[44] South Australia was then the only State whose decree of divorce could be upheld in this country. In fact, at the date of the petition, Harrison was domiciled in England although his home was in New Zealand. The worst implication of the decision is that, by the unnecessary doctrine of reverter which invoked the domicile of his father at the date of his birth, Harrison could have been born in Singapore of Dutch parents and never have lived in England and still have had an English domicile, as would any child of his born before Harrison came of age. Although he was old enough to undertake the responsibility of marrying,[45] Mrs. Harrison's domicile, until her husband was at least 21, was that of her father-in-law. It requires little distortion of fact to make her domicile dependent on that of her husband's grandfather even though she may herself have been fully independent and of mature age.

Any critical examination of the cases leads one to the conclusion that the rules relating to domicile, of origin, choice and dependence, are unrealistic and undesirable, and the technicalities and presumptions which today attach to the concept have partially destroyed its utility. Although it may be doubted whether it is correct in principle that only one country should determine questions of divorce, if this view is to be adopted, as it has been in English law, then it requires a connecting factor which can indicate the country most interested in the parties and the issue of divorce, and this the concept of domicile has failed to do. If only one system of law is to be applied, it should be that of the community in which, in the view of the forum, the parties last made their home and to which they last belonged. Before domicile can ever justify its retention as the connecting factor, it requires drastic revision. The concept of a domicile of origin

[43] [1906] P. 135.
[44] *Travers* v. *Holley* [1953] P. 246; [1953] 3 W.L.R. 507.
[45] The 1954 Committee Report states that 'we see no reason why a male infant who is old enough to marry and who has in fact married should not be able to acquire his own domicile of choice'.

should be abandoned[46] and both domicile of choice and of dependence simplified. If a man is old enough to be independent of his parents and to establish a home and family, the cause for a domicile of dependence disappears and he should be able to acquire a separate domicile in the country in which he makes his home.

Choice of Jurisdiction and Unity of Domicile

It is, however, not so much in relation to choice of law as to choice of jurisdiction that the employment of the concept has caused such hardship and injustice. Once the correct law is determined by the forum, questions of jurisdiction should be theoretically irrelevant. In practice, however, it would be too much to ask of the judges to exercise a jurisdiction based solely on residence in order to adjudicate on complicated questions of foreign law. English divorce law alone is quite enough to administer and such a course would place an intolerable burden on all concerned in the divorce proceedings. On the other hand, it is debatable whether, to escape the consequences of confining jurisdiction to the court of the domicile by permitting its exercise on the basis of residence, whether or not prescribed in duration, this should entail the automatic application of the *lex fori,* for, unless the requirement of residence were made equally intolerable, such a course might itself disregard the law which should govern questions of divorce.

A *via media,* originally advocated by Professor Cheshire,[47] was suggested in the 1947 Final Report of the Committee on Procedure in Matrimonial Causes,[48] but to date has not been adopted by Parliament[49]: 'Where a husband and wife are resident in this country, the High Court should have jurisdiction to grant a decree of divorce . . . as if the parties were at the material time domiciled here, provided that the law of the place

[46] By recommending the abolition of the doctrine of revival (Art. 1, para. 5), the Committee in fact rejects the idea of a domicile of origin. When a child is born it acquires a domicile of dependence, and this and any subsequent domicile of dependence or choice are sufficient to determine questions of status and person.

[47] 'The International Validity of Divorces' (1945) 61 *L.Q.R.,* p. 352 at p. 372.

[48] Cmd. 7024.

[49] A sub-committee of the Royal Commission on Marriage and Divorce is at present considering the law of domicile in relation to divorce jurisdiction.

where the parties are domiciled recognises as sufficient cause for a decree of divorce . . . the same cause as that for which it is sought here'.[50] Whilst one may perhaps question the implied retention of the present rules for determining the domicile, the recommendation goes far towards reconciling the interests both of the forum and of the one community which is most implicated in the proceedings. Above all, it avoids referring solely to the court and law of the domicile and prescribing an arbitrary minimum period of residence before jurisdiction can be exercised.

For those who wonder whether such drastic reform is necessary, one has but to point to the hardships caused by the present common law system and to the questionable form of the recent statutory remedies. In *Le Mesurier* itself the husband, who was resident, but not domiciled, in Ceylon had, in his wife's persistent misconduct, grounds for divorce recognised not merely there but in England where, by English standards, he was domiciled. In either domestic system the result would have been the dissolution of the marriage. Notwithstanding this, the Privy Council held that the proceedings could be brought only in the court of the domicile, thousands of miles away. The principal merit of this conclusion was that of simplicity, and yet, though a decision of the Privy Council, it has so confused the issues that both English common law and statute are still based on its policy of linking the problems of law and jurisdiction and have thereby, it is submitted, sacrificed justice to convenience.

Unity of Domicile and Divorce Jurisdiction

The most grievous consequences of confining jurisdiction, as opposed to choice of law, to the courts of one country become obvious when considering the inflexible rule of unity of domicile which is still an important feature of the divorce law of England, Scotland and the Commonwealth but has long been relaxed in the United States.[51] This rule has so often and so vigorously been attacked in the past that it would be presumptuous to do more in this paper than outline its implications and mention some of the criticism it has evoked.

By treating the parties as one, it penalises the innocent

[50] *Loc cit.*, note 48 above, p. 31.

[51] Cf. *Cheever* v. *Wilson* 76 U.S. 108 (1869); *Sawtell* v. *Sawtell* 17 Conn. 284 (1845); *Tolen* v. *Tolen* 2 Black 407 (1831); *Harding* v. *Alden* 9 Greenl. 140 (1832).

deserted wife, who is forced to petition in the court of her husband's domicile. If that happens to be a country which will not grant divorce, such as Eire, Italy, Spain or the Argentine, she is without a remedy. If the grounds of her petition are not recognised by the domicile (and many systems which admit the right to divorce exercise it most reluctantly), she must again suffer, even though she has been judicially separated from her husband [52] or he is living in open adultery. Though she herself may have not the slightest connection with his new domicile, whose law may employ nationality or some other connecting factor and declare jurisdiction, though she may be unable to ascertain either his domicile or even his whereabouts,[53] she must nevertheless try to pursue him, unless she can find another jurisdiction which will grant her a decree, recognisable by the courts of what English law conceives as his new domicile.[54] When one considers these difficulties and thinks of the technical character of domicile, it seems strange that the courts should ever have adopted so inequitable a rule for the purpose of determining jurisdiction. One must ascribe their attitude primarily to the belief that no foreign court would ever apply any law but its own, and that rather than extend jurisdiction and run the risk of the wife invoking systems of law which were inappropriate to the issue of divorce, it was preferable to confine it even if this entailed severe hardships. Though the rule still meets with the approval of some [55] it has been strongly criticised in the past. Dr. Morris has stated that 'its social consequences are so disastrous that one doubts whether it can be tolerated much longer by a civilised community',[56] and Professor Cowen that 'it flies in the face of common sense and experience'.[57] Professor Reed speaks of 'the cramping effect of the reactionary and short-sighted decision of the Privy Council in *Att.-Gen. of*

[52] *Att.-Gen. of Alberta* v. *Cook* [1926] A.C. 444.

[53] She may however be able to invoke the provisions of section 8 Matrimonial Causes Act, 1937, and apply for a decree of presumption of death and dissolution of marriage. See *Wall* v. *Wall* [1950] P. 112.

[54] Or be in the position of the respondent in *Travers* v. *Holley* [1953] 3 W.L.R. 507.

[55] Its retention is advocated in the 1954 Report. See too Kahn-Freund, 'Law Reform (Miscellaneous Provisions) Act, 1949' (1950) 13 *M.L.R.*, p. 222 at p. 226.

[56] See 'Recognition of Divorces granted outside the Domicile' (1946) 24 *Canadian Bar Review*, p. 73 at p. 73.

[57] 'Divorce and the Domicile' (1952) 68 *L.Q.R.*, p. 88 at p. 89.

Alberta v. *Cook*',[58] and Professor Graveson of the result that 'the married woman may dispose of her own property, make her own contracts, commit her own torts, but never acquire her own domicile'.[59] The fault in the doctrine of unity of domicile lies not so much in its insistence that the status of both parties to the marriage should be governed by one system of law as in coupling it with the rule that jurisdiction in divorce should be limited to the courts of one country.

At one time the courts, whilst adhering in theory to the principle, sought in practice to mitigate its consequences by courageous and wholly admirable methods. Even Brett, L.J., a staunch advocate of the domicile rule, thought, in *Niboyet,* that a deserting husband, if sued by his wife in the country in which he had left her, 'could not be heard to allege that that was not still the place of her married home . . .'.[60] 'In undefended cases, these courts', said Hodson, L.J., recently,[61] 'did not inquire what had happened to husbands after desertion in such circumstances, either because it was thought they were estopped from denying an English domicile or because the burden was upon them to show an abandonment and they had done nothing to discharge the burden'. Confronted by a similar situation in *Stathatos* v. *Stathatos,*[62] Bargrave Deane, J., whilst recognising that precedent would deny the wife her remedy, valiantly concluded: 'But I always take my courage in my own hand and act, so far as I can, according to what I feel and believe to be just and right. . . . I am going to pronounce a decree *nisi*'.[63] In these cases English law was clearly applied as the law of the last matrimonial home rather than as the *lex fori.* After the decisions, however, in *Att.-Gen. of Alberta* v. *Cook*[64] and *H.* v. *H.*,[65] even the most independently minded judges succumbed to the illogicalities of the unity rule of jurisdiction and it was left for Parliament, by a number of cautious, belated though well intentioned enactments, to

[58] See Graveson, 'Jurisdiction, Unity of Domicile and Choice of Law' (1950) 3 *International Law Quarterly,* p. 371 at p. 380.
[59] See Graveson, 'Capacity to acquire a Domicile', *ibid.,* at pp. 149–163.
[60] (1878) 4 P.D. 1 at 14.
[61] *Travers* v. *Holley* [1953] 3 W.L.R. 507 at 515.
[62] [1913] P. 46.
[63] At p. 51.
[64] [1926] A.C. 444.
[65] [1928] P. 206.

provide some measure of relief from the disastrous consequences of the common law.

STATUTORY EXTENSIONS OF DIVORCE JURISDICTION AND LAW

It was not, however, until 1937 that the English courts were by statute accorded some jurisdiction even though the parties were domiciled abroad at the date of the petition.[66] By section 13 of the Matrimonial Causes Act of that year,[67] proceedings by a wife domiciled outside England became possible if she had been deserted by her husband or if he had been deported from the United Kingdom as an undesirable alien, provided that immediately before such desertion or deportation the parties had been domiciled in this country. Although it goes some way towards mitigating the unfortunate position of the deserted wife, the section is of no assistance to her, however long she has been resident here, if she were domiciled in England before marriage but not desertion, or if her husband had the good sense either never to acquire an English domicile or first to abandon it and then commit the matrimonial offence.

The next encroachment on the *Le Mesurier* doctrine was effected by the Matrimonial Causes (War Marriages) Act of 1944,[68] 'the G.I. Brides' Magna Charta', as Professor Kahn-Freund has called it,[69] a stop-gap enactment designed to provide some remedy in this country for those women who had married members of the allied armed forces stationed in England but domiciled abroad and to whom, therefore, the 1937 Act was almost invariably inapplicable. This temporary measure provided that in the case of marriages celebrated between the outbreak of war and 'the appointed day' (which was subsequently fixed as June 1, 1950),[70] where immediately before the marriage the husband was domiciled outside the United Kingdom, the High Court should have jurisdiction as if the parties were at all material times domiciled here, proceedings to be

66 The recognisable jurisdiction of courts in British possessions was widened by the Indian and Colonial (Divorce Jurisdiction) Act, 1926, 16 & 17 Geo. 5, c. 40 (extended in 1940 and 1950) and by numerous Orders in Council between 1928 and 1937.

67 1 Ed. 8 and 1 Geo. 6, c. 57, now s. 18 (1) (*a*), 14 Geo. 6, c. 25.

68 7 & 8 Geo. 6, c. 43.

69 *Loc. cit.*, note 55 above, at p. 226.

70 S.I. No. 672 of 1950.

commenced not later than June 1, 1955.[71] Unfortunately relief is denied the wife if at any time since marriage she has resided together with her husband in the country in which he was then domiciled, and for these purposes residence anywhere in the United States, India or in any British possession outside India is fatal to the petition if the husband is domiciled in any one of the States of the Union or the provinces of such countries respectively.[72] If, therefore, she follows him to effect a reconciliation and fails, she may well find by construction of law that she has resided together with him within the meaning of the Act.[73]

The most radical statutory extension of English divorce jurisdiction is to be found in section 1 of the Law Reform (Miscellaneous Provisions) Act, 1949,[74] which has been termed 'the most important Act of Parliament ever passed in connection with the Conflict of Laws'.[75] Whereas the two earlier enactments adhere to a garbled form of domicile as the basis of divorce jurisdiction, the 1949 statute rests it upon an English residence for three years immediately preceding the petition providing the husband was not domiciled in any other part of the United Kingdom, the Channel Islands or Isle of Man.[76] This somewhat unnecessary restriction causes little hardship in practice since the wife in such cases can always sue in the court of the domicile without much inconvenience. The law applicable to divorce by the 1949 Act is the *lex fori*[77] and this presents the most interesting aspect of the statute. Not merely is a new connecting factor adopted for choice of law but the idea of some single 'proper law' inherent in the *Le Mesurier* doctrine and in the 1947 recommendation of the Denning Committee on Procedure has, more emphatically than in the earlier enactments, been discarded, and the possibility of more than one system of law governing divorce has now been recognised. By prescribing a minimum and quasi-domiciliary form of residence, the Act seeks to justify its automatic application of English law, on the assumption that any period more than three years will cause hardship similar to that entailed by the common law rule whilst a lesser period hardly warrants the choice of the *lex fori*.

[71] Section 1 (1).
[72] Section 2 (2).
[73] Cf. *Hopkins* v. *Hopkins* [1950] 2 All E.R. 1035.
[74] 12, 13 & 14 Geo. 6, c. 76, now section 18 (1) (*b*), 14 Geo. 6, c. 25.
[75] *Loc. cit.*, note 55 above, at p. 225.
[76] Section 1 (1) (*b*).
[77] See Cheshire, *op. cit.*, p. 367.

To any proponent of a 'proper law' theory of divorce, the fatal flaw in all three enactments, whether they found jurisdiction on the wife's fictitious domicile or on her statutory residence in England, is that by linking the problems of law and jurisdiction, they confuse the issues in the same way as the common law. Whilst the rules determining jurisdiction required reform, no radical change was necessary in those determining choice of law, and it is arguable whether it is wise to apply a system of law which, as in the 1949 Act, may have had no relevance to the marriage and whose sole connection with the parties may be the residence in England of one of them for an arbitrary period of three years.

This solution, generally adopted in the Commonwealth,[78] is fundamentally similar to that of the American courts which, by abandoning the doctrine of unity of domicile and the idea of 'reverter', have retained, as the connecting factor in divorce, domicile at the date of the petition, despite considerable differences between the States as to the minimum period of residence which is needed to support a claim of domicile. In two States[79] three years is necessary, as in England; in Florida three months and in Nevada only six weeks. Where the parties are separated, the wife is allowed to sue in the court of her own domicile and her husband is estopped from preventing her petitioning in his courts. Although this policy, involving not merely new jurisdiction but new law, has met with strong approval in some quarters, it presents obvious difficulties when adopted unilaterally by systems which are unable to invoke a Full Faith and Credit Clause to secure recognition of their decrees.[80]

The most fundamental and interesting question underlying problems of law and jurisdiction remains, however, whether it is desirable to have several potentially applicable systems of law, employing different criteria and recognising different grounds, to determine questions of divorce. Should the incidents of marriage be regulated by the law of the country in which the

[78] See Griswold, 'Divorce Jurisdiction and Recognition of Divorce Decrees —A Comparative Study', (1951–1952) 65 *Harvard Law Review*, p. 193.

[79] See Morris, *loc. cit.*, note 11 above, p. 303.

[80] Thus the 1954 Report states that 'quite apart from considerations of social policy, we think it desirable that the doctrine of unity of domicile of husband and wife should be maintained, so as to avoid the many complications which in practice follow from the solution . . . '.

parties established their matrimonial home or, inviting an additional conflict of laws, by systems whose concern is in fact the subsequent conduct of only one of them? By the statutory adoption of the latter view, the whole basis of divorce in English Private International Law has been changed. Although much of the hardship has been eliminated, this has been achieved at the cost of partially sacrificing the traditional status theory of divorce to the demands of practical expediency and it is perhaps unfortunate that Professor Cheshire's recommendation, endorsed by the Denning Committee and avoiding that sacrifice has so far been completely ignored.

RECOGNITION OF FOREIGN DIVORCES

The third basic problem of divorce in the Conflict of Laws is that of recognition. Unlike choice of law and choice of jurisdiction, however, this has been almost[81] completely ignored by Parliament even in recent years, and the problems of those who have been divorced abroad and seek recognition of the dissolution in this country have been left, in somewhat off-hand fashion, for the courts to settle.

Consistent with their policy of referring questions of law and jurisdiction to the joint domicile of the parties at the date of the petition, the English courts originally recognised only such decrees as issued from the domicile.[82] The English rules of ascertaining the domicile were, and still are, adopted to determine the validity, for English purposes, of the exercise by a foreign court of divorce jurisdiction and, provided that these are satisfied, almost all other factors, including the nationality or previous domicile of the parties,[83] the grounds for divorce,[84] the failure to comply with procedural requirements[85] and even probably the suborning of witnesses[86] or the respondent's want of notice of the proceedings,[87] are irrelevant to the issue of recognition. One apparent and debatable limitation, however,

[81] There is some provision for recognition in section 4 of the War Marriages Act but its application is confined to analogous Dominion legislation.
[82] *Bater* v. *Bater* [1906] P. 209; *Harvie* v. *Farnie* (1882) 8 App.Cas. 43.
[83] *Bater* v. *Bater* [1906] P. 209.
[84] *Mezger* v. *Mezger* [1937] P. 19.
[85] *Pemberton* v. *Hughes* [1899] 1 Ch. 781.
[86] Cf. *Perin* v. *Perin*, 1950 S.L.T. 51.
[87] *Maher* v. *Maher* [1951] 2 All E.R. 37. But see *Rudd* v. *Rudd* [1924] P. 72.

is to be found in the recent refusal in *Maher* v. *Maher,*[88] to recognise that a monogamous English marriage can be terminated in the domicile by a form of divorce appropriate to polygamy, a conclusion which, it is felt, has been justly criticised[89] on the grounds that it refutes the reasons why, even to-day, questions of divorce are primarily referred to the parties' domicile. Accepting the traditional view that the interests of the domicile should govern the issue, and provided it can be proved that the parties are effectively divorced by the *lex domicilii,* the form of dissolution should be immaterial. This restriction leads one to the further question whether, in view of the recent decision in *Har-Shefi* v. *Har-Shefi,*[90] the English courts will continue to deny recognition to divorces which are not decreed by a court of law, even if they are appropriate to monogamous marriages and permitted by the domicile.

Before this can be answered, however, two important extensions of the rules of recognition must first be considered. In 1906, it was decided in *Armitage* v. *Att.-Gen.*[91] that, provided the decree would be upheld in the courts of the domicile, a divorce granted in another jurisdiction will be recognised in this country, notwithstanding that it fails to issue from the domicile. Although the actual grounds of the decision are controversial and have been strongly criticised by Dr. Morris,[92] its implications are most welcome. It escapes from the former procedural rigidity of the common law and recognises the interests of the country which, in theory at least, should be most concerned in questions of divorce. Indeed the 1947 recommendation as to choice of law and jurisdiction is merely an extension of the *Armitage* rule in another context, and the same Committee has advised on similar lines that 'a decree of divorce . . . granted to parties by a court of the country where they are resident for a cause recognised by the law of that country should be recognised as valid here provided that the cause for which the decree was granted is recognised by the law of the place where they were domiciled as sufficient cause for such a decree'.[93] The most

[88] [1951] 2 All E.R. 37.
[89] Cowen, *loc. cit.,* note 57 above, at p. 95.
[90] [1953] P. 161; [1953] 2 W.L.R. 690.
[91] [1906] P. 135.
[92] *Loc. cit.,* note 56, at p. 73 *et seq.* But see Tuck, 'Recognition of Foreign Divorces—A Reply to a Criticism' (1947) 25 *Canadian Bar Review,* p. 226, and Griswold, *loc. cit.,* note 78 above, at p. 225.
[93] Cmd. 7024, at p. 31.

effective result of the decision has been that, because of the American employment of a Full Faith and Credit Clause, provided that the petitioner is domiciled, in the English sense, in any one of the American States, the decree of any other State of the Union will generally be recognised in this country with little difficulty.[94] The decision, therefore, goes some way towards the ultimate ideal of those who argue that the decree of any foreign court, solemnly and responsibly assuming jurisdiction, should be upheld throughout the civilised world.

The second and most welcome extension of the law was effected last year by the Court of Appeal in *Travers* v. *Holley*.[95] It is both anomalous and regrettable that although the basis of English divorce jurisdiction has been widened by the 1937, 1944 and 1949 Acts, no statutory provision has been made, apart from a rather limited section in the temporary War Marriages Act,[96] for recognising the decrees of those States which, as in many Commonwealth jurisdictions, have partially discarded the *Le Mesurier* rule and replaced it by a basis of residence or fictitious domicile, or, as in the United States, have never acknowledged its supremacy and have in effect always adopted a prescribed minimum residence as the connecting factor in divorce. Until 1953 it appeared quite probable that the English court would, as in the recent Scottish decision in *Warden* v. *Warden*,[97] refuse recognition to a decree founded on a jurisdictional basis similar to its own unless the decree issued from, or would be recognised by, a court of the joint domicile. It was even likely as a logical consequence of this attitude that although section 1 of the 1949 Act extended the jurisdiction of the English courts, they would refuse to recognise a similar extension conferred on the Scottish courts by section 2, and it was thought that they would refute the cogent and attractive argument that the principle of recognising only decrees of the joint domicile was merely the complement in matters of recognition of the *Le Mesurier* rule and that they would therefore refuse to depart from it unless expressly authorised by statute.[98]

[94] *Loc. cit.*, note 11 above, at p. 289.
[95] [1953] P. 246; [1953] 3 W.L.R. 507.
[96] Section 4.
[97] 1951 S.L.T. 26.
[98] See 'Recognition of Foreign Divorces' (1945) 23 *Canadian Bar Review*, pp. 244 249, correspondence between Professor Raphael Tuck and A. J. Wickens, K.C.

This dilemma has now been settled by the Court of Appeal decision in *Travers* v. *Holley,* the facts of which, though extremely interesting, provide some indication of the dangerous possibilities of the present English concept of domicile. In 1937 A and B, a recently married couple whose domicile was England, emigrated to New South Wales. In 1940, the husband A left his wife in Sydney to seek work in another part of the State. He later joined the Australian forces, subsequently transferring to the British forces, and in 1943 B petitioned in New South Wales on the grounds of his desertion. He was served with notice of the petition but the suit was undefended and in 1944 a decree absolute was granted. In 1945 B married C and in 1949 A married D. When his second marriage also proved unsuccessful, A decided to try to kill two birds with one stone and petitioned in England for a divorce from B on the grounds of her adultery with C, by whom she had had a child since 1949, alleging that the 1944 decree was invalid since he had never acquired a New South Wales domicile and its court therefore had no divorce jurisdiction recognisable in this country. In respect of his own admitted adultery with D, he begged the exercise of the Court's discretion. This audacious argument succeeded before Mr. Commissioner Grazebrook who, following the unfortunate decisions in *Winans* v. *Att.-Gen.*[99] and *Ramsay* v. *Liverpool Royal Infirmary,*[1] found that A had never acquired a New South Wales domicile and, since, even if the intention were proved, it was impossible in law to acquire a domicile in Australia,[2] the court in 1944 had no recognisable jurisdiction, even on the basis of the New South Wales Matrimonial Causes Act, 1899,[3] which, though containing terms almost identical to section 13 of the English Matrimonial Causes Act, 1937, nevertheless required A to have been domiciled in New South Wales before his desertion.

B appealed, and in the Court of Appeal the case reached the

[99] [1904] A.C. 287.
[1] [1930] A.C. 588.
[2] *Gatty* v. *Att.-Gen.* [1951] P. 444. See however the letter to *The Times,* February 22, 1954, in which William Latey, Q.C., argues most persuasively against this rule and points out that, to the best of his knowledge, 'though both Russia and Switzerland are constitutionally federal sovereign powers . . . it has never occurred to our courts to require proof of domicile in any one of the Soviet Republics or of the Swiss Cantons'.
[3] New South Wales Matrimonial Causes Act, No. 14, 1899, s. 16 (*a*).

only just solution possible. Somervell and Hodson, L.JJ., disagreed with the Commissioner and held that A had acquired a domicile of choice in New South Wales. 'If one finds', said Somervell, L.J., 'that a man has decided that he has no future in England and proceeds to seek his fortune in a new country, this frequently, perhaps normally, though not necessarily, indicates an intention to settle permanently'.[4] Jenkins, L.J., on the other hand, dissented on this point and, carefully examining the previous authority on domicile, found on the facts that the Commissioner was correct in finding that there was 'no fixed and determined purpose'[5] to make a permanent home in New South Wales nor even, apparently, in Australia. Moreover, although this argument had not been pressed before the Court, the learned Lord Justice felt, further agreeing with the Commissioner, that the husband was not estopped from challenging the validity of the New South Wales decree. Somervell, L.J., on the other hand thought that it was certainly arguable that there had been conduct conducing by the husband[6] or that the Court's discretion should not have been exercised in his favour.

This part of the decision, since it depends primarily on proof of A's intention, is not of great importance except in so far as it reflects, in the majority view, a possible and welcome reaction to *Winans* and *Ramsay*. Though the facts are not fully reported, there would appear to have been from the point of precedent, considerable force in the minority view of Jenkins, L.J., and Mr. Commissioner Grazebrook. The real importance for the purposes of English Private International Law lies in the unanimous rejection by the Court of Appeal of the husband's further contention that even if he had had a domicile in New South Wales at the date of the desertion, he had abandoned it before the date of the petition in 1943 and that an English court could not recognise a decree of a foreign jurisdiction, in which the parties were not domiciled at the date of the petition, even though by almost identical statutory provisions, it could itself grant a decree in similar circumstances. Dissenting, therefore, from the view adopted in *Warden* v. *Warden*,[7] it was held by the majority that 'what entitles an English court to assume jurisdic-

[4] [1953] W.L.R. 507 at 510.
[5] *Ibid.*, at p. 512, citing Lord Halsbury in *Winans* v. *Att.-Gen.*
[6] Cf. *Clayton* v. *Clayton* [1932] P. 45.
[7] 1951 S.L.T. 26.

tion must be equally effective in the case of a foreign court',[8] and in this view Jenkins, L.J., concurred in an *obiter dictum,* a conclusion which, on the facts, avoided the difficult question of determining whether (and when) A acquired a fresh domicile whilst on active service.[9]

The decision is, with respect, eminently satisfactory, especially Hodson, L.J.'s somewhat broader view 'that where . . . there is in substance reciprocity, it would be contrary to principle and inconsistent with comity if the courts in this country were to refuse to recognise a jurisdiction which *mutatis mutandis* they claim for themselves'.[10] This raises several questions which, one hopes, will similarly be answered in the future. What will happen if in fact there is no analogous statutory provision but the foreign court has exercised jurisdiction on a basis now recognised in English domestic law, *e.g.,* three years' residence? What if jurisdiction is exercised on six months' residence but in fact the party has been resident within the jurisdiction for upwards of three years? How 'substantial' must reciprocity be, and will it be sufficient if jurisdiction is based on two years' residence? Will an English court recognise a decree based upon an equivalent of the War Marriages Act, 1944, if the foreign petition is presented later than June 1, 1955? All these are problems which may yet arise, and one must hope, in the interests of comity and reciprocity, that the judges will take as broad and as enlightened a view as the Court of Appeal in *Travers* v. *Holley.*

Finally the question remains to be considered whether the courts will refuse recognition of a divorce not granted by a court of law. In *Har-Shefi* v. *Har-Shefi*[11] a wife petitioned for a declaration that her marriage had been validly dissolved by a Jewish bill of divorcement before the Rabbinical court of the Beth Din in London. At the date of petitioning the High Court, the wife was resident in England and, though her (former) husband was domiciled in Israel, she claimed that she was then domiciled in England because of the effect of the '*get*' which,

[8] [1953] 3 W.L.R. 507, *per* Hodson, L.J., at p. 516.
[9] *Donaldson* v. *Donaldson* [1949] P. 363. See too *Sellars* v. *Sellars* [1942] S.C. 206; *Baker* v. *Baker* [1945] A.D. 708. But see art. 2, paras. 2 and 3 of the 1954 Committee Report.
[10] [1953] 3 W.L.R. 507 at 516.
[11] [1953] P. 161; [1953] 2 W.L.R. 690.

dissolving the relationship of husband and wife, enabled her as an unmarried woman to acquire a separate domicile in England. Barnard, J., dismissed the summons holding that he had no jurisdiction both because he could neither grant a declaration unattached to any other claim for relief, nor, since the husband was domiciled in Israel, consider the validity of the divorce. The Court of Appeal rejected the first reason unanimously and the second by a majority, Singleton, L.J., dissenting. It is respectfully submitted that, since it was found on the procedural point on a construction of Order 25, r. 5 and previous precedent [12] that the English court had discretionary declaratory jurisdiction based on residence, it was unnecessary to consider the wife's domicile at the date of the petition.[13] All that needed to be resolved was whether the Jewish Bill of Divorcement was recognised by Israel, since that was then the joint domicile of the parties. In two recent declaratory actions *Schuck* v. *Schuck* [14] and *Igra* v. *Igra* [15] there is no mention in the judgments of any requirement that the petitioner must be domiciled in this country and the Court of Appeal could have ignored the nullity analogy of Barnard, J., instead of approving it and reaching an opposite conclusion on the perplexing authority of *De Reneville* v. *De Reneville*.[16]

The importance of the decision, which subsequently resulted in the declaration sought being made by Pearce, J.,[17] lies in its adherence to the principle, inherent in *Armitage* v. *Att.-Gen.* but unnecessarily qualified in *Maher* v. *Maher,* that if the divorce is recognised for domestic purposes by the domicile, it should also be recognised in this country. In the words of the Sixth Edition of Dicey,[18] cited and approved by Pearce, J., 'if the cause for divorce is immaterial so ought the method to be . . .',[19] and this view had already been approved by the decision of the Privy Council in *Sassoon* v. *Sassoon,*[20] holding that it would be wrong, to find that a marriage which had been legally

[12] [1953] 2 W.L.R. 690 at 694–696.
[13] Cf. Thomas, (1953) 3 *International and Comparative Law Quarterly,* p. 444.
[14] (1950) 66 T.L.R. 1179.
[15] [1951] P. 404.
[16] [1948] P. 100.
[17] [1953] P. 220; [1953] 3 W.L.R. 200.
[18] At p. 371.
[19] [1953] 3 W.L.R. 200 at 202.
[20] [1924] 1 A.C. 1007.

dissolved according to the law of the domicile, continued binding in England. The logical conclusion of this reasoning would appear to be that the *Hammersmith Marriage Case*[21] and *Maher* v. *Maher*[22] should have been otherwise decided, since in both, the form of the dissolution was recognised by the domicile. If, on the other hand, the parties in *Har-Shefi* had been domiciled in England when the bill of divorcement was obtained, it seems clear from *Preger* v. *Preger*[23] and *Spivack* v. *Spivack*,[24] that the wife's petition would have been refused, and the recent decision of the Court of Appeal in *Joseph* v. *Joseph*[25] is a clear illustration of the dangers which beset a deserted wife if she obtains a '*get*' when domiciled in this country.

CONCLUSIONS

(1) The rules governing questions of divorce law and jurisdiction are in a confused state and rest on two fundamentally different theoretical bases. It would have been more appropriate and consistent either to have discarded the *Le Mesurier* rule entirely together with the principle of unity of domicile, and founded jurisdiction on the separate prescribed residence of the parties, or, alternatively, to have retained the idea of a single law of divorce and expanded the basis of jurisdiction on the lines advocated by Professor Cheshire and the 1947 Committee Report. The latter view, though more difficult to apply in practice, is in greater harmony with the status theory of divorce and conforms to the traditional attitude of the English law.

(2) Since the *Le Mesurier* rule has been retained, the English concept of domicile should be statutorily revised. It has become so technical and impractical, that its true function in matters of divorce is too often obscured.

(3) Having regard to the present dichotomy of the rules relating to jurisdiction and choice of law in divorce, the problem of recognition has been sensibly dealt with by the courts, both in upholding the interests of the domicile and more recently in extending the basis of recognition.

[21] *R.* v. *Hammersmith Superintendent Registrar of Marriages, ex. p. Mir-Anwaruddin* [1917] 1 K.B. 634.
[22] [1951] 2 All E.R. 37.
[23] (1926) 42 T.L.R. 281.
[24] (1930) 46 T.L.R. 243.
[25] [1953] 1 W.L.R. 1182.

(4) To ensure some greater and more certain degree of universality of status, international agreement should be sought with other countries, if only with the Commonwealth and the United States, to establish basic principles for mutual recognition and thereby avoid the unfortunate problem of a marriage valid in one country and dissolved in another, with its consequent dangers of bigamy and bastardy.

TRUSTEE INVESTMENTS AND AMERICAN PRACTICE

VALENTINE LATHAM

IN December, 1952, the Nathan Committee on Charitable Trusts published its Report,[1] suggesting, amongst other things, reform of the law as to the range of trustee investments. As is well known, in the absence of a wider permissive clause in the settlement,[2] an English trustee may invest only in certain securities, most of them being government and government guaranteed securities of the United Kingdom, and certain other parts of the Commonwealth. There is no need to enumerate the details of the legal list: it is limited fairly closely and, apart from Stock of the Bank of Ireland, all the securities yield a fixed money return.[3]

As the Nathan Committee pointed out,[4] since 1925 some of these stocks have ceased to exist, limiting the list yet more closely; though some statutes have allowed one or two extra investments, when the government wanted to finance some scheme, such as the coal industry in 1938.[5] But perhaps the most important observation made by the Committee on the subject of investment is that 'If a long view is taken, inflation appears to be a natural tendency of currencies and the trend of the last fifty years may be regarded as merely an acceleration of this natural tendency. The acceleration has, however, become a matter of grave anxiety; the real value of even the soundest currency has been greatly reduced'.[6] By real value is meant the value measured not in money, but in the goods for which it could be exchanged. The remedy suggested by the Committee is that the legal list should be extended to allow the investment of half the trust funds in the shares and debentures of financial, industrial and commercial companies.[7]

1 Report of the Committee on the Law and Practice Relating to Charitable Trusts, Cmd. 8710, Chap. 8.

2 Such clauses are almost invariably inserted in professionally drafted settlements. Precedents can be found in recent copies of *The Conveyancer*, Vol. 11, Form 12 (7) (IV); Vol. 12, Form 21 (3) (LV); Vol. 13, Form 3 (8); *ibid.*, Form 4 (8) (III); Form 26 (7) (c); Form 29 (7) (f) (IV).

3 *Nathan Report*, s. 284 (c).

4 *Ibid.*, s. 284 (a).

5 Coal Act, 1938; Keeton, *Trusts* (5th ed. 1950) p. 255.

6 *Nathan Report*, s. 286.

7 *Ibid.*, s. 289.

THE NATHAN REPORT

To return to the Nathan Committee's recommendation to open the equity market to the trustee, so that part of the trust funds may be invested well in periods of inflation; four safeguards are suggested[8]:—

'(1) A limitation on the proportion of the total fund which could be invested outside gilt-edged stocks—perhaps 50 per cent'.[9]

'(2) A limitation to companies which have paid a dividend on their equity capital of not less than 4 per cent in each of the past, say, ten years'.

Here one might object that the limitation is virtually meaningless, in as much as the company may have made considerable capital gains or losses long before the ten years started to run and if so, the nominal capital will have little relationship to the actual capital of the company.[10] If, on the other hand, the calculation is made not on the nominal value of the shares, but on their market value at the beginning of the ten years, most companies will yield similar results, as the market value will be affected by the probable earning power of the company[11]: most equally sound industrials yield much the same dividend on the market price at a given time. On such a test almost any company would qualify, except during a depression. It is submitted that no test of this type is workable.

'(3) A limitation of investment to stock and shares of a class issued to the nominal value of not less than £1,000,000 and which are quoted on the Stock Exchange, London, so that a reasonable market should be available to permit of ready realization of the investment'.

The objection as to the unreal value of the nominal capital applies also to this suggested restriction. Presumably the Committee wanted to ensure that the company should have assets of this value, but was deterred from drafting its test in terms of the value of the assets because of the difficulties of assessing it.[12]

[8] *Nathan Report*, s. 289.
[9] See p. 152, below.
[10] 'Trustees and Investment Powers' (1953) *Accountancy*, p. 85.
[11] H. Bell and H. Frame, 'Legal Framework, Trends, and Developments in Investment Practices of Life Insurance Companies' (1952) 17 *Law and Contemporary Problems* (hereafter L. & C.P.), p. 45 at pp. 84 and 85.
[12] *E.g.*, the revaluation of I.C.I. in 1951. 'Finance and Commerce' (1951) 124 *The Accountant*, p. 539.

If this provision becomes law it will not avoid the necessity for express powers in settlements to allow the retention of family businesses.

'(4) A limitation regarding debentures that they should be in the nature of prior debentures with a prohibition on any charge ranking in priority; and as regards preference shares that no debentures or other preference shares should be issued with priority'.

Such a provision seems to be extremely dangerous, as it might prevent the company from borrowing the sums needed to preserve the security for the benefit of the debenture holders. Under the Trustee Act, 1925, the preference shares of railway companies that had paid 4 per cent on their ordinary stock were trustees investments. This resulted in these dividends being paid during the depression of the 'thirties to the detriment of the preference shareholders. The position under this proposed limitation might be scarcely less farcical.

These provisions have received notice in the accountancy journals.[13] In the March, 1953, issue of *Accountancy*,[14] it was pointed out that preference shares and debentures are almost invariably fixed money securities, and though they may yield a greater income than government stock, they are separated from real values.[15] This objection may not be serious in trusts of short duration, but charitable trusts, which are exempt from the perpetuity rule, may last for centuries and though the nominal income may be kept up, its purchasing power may be drastically cut. However, many debentures do produce higher income yields than do gilt-edged.[16] The writer in *Accountancy* continues by arguing that equity shares fluctuate widely on the money market[17] and buyers in 1947 suffered capital losses equal to several years' dividend. This argument, also, can to some extent be met; a trust fund usually comes into the trustee's hands largely in the form of securities. The purchasers in 1947 were

[13] *E.g.*, Keeton, 'Trustee Investment and the National Investment Policy' (1953) 128 *The Accountant*, p. 390.

[14] See note 10, above.

[15] *Nathan Report*, s. 287.

[16] See p. 148, below.

[17] But equities fluctuate little over the decades. And the better ones 'tend to fluctuate in some general relation with consumer price level, or with the cost of living'. Anderson, 'Management—the Number One Factor for Investment in Common Stocks' (1954) 33 *Trust Bulletin*, January, p. 14.

often also the sellers of other stocks and they saved loss on the stocks they sold. Granted a continuous policy of investment in equities, rises and falls in the market as a whole are not so drastic as at first appears; what matters is the fluctuation of dividends, measured in real values. The speculator may try to sell when shares are high and buy when they are low, but this the trustee is prohibited from doing to any large extent by his duty not to speculate.[18]

The next objection in the article seems stronger: 'The truth is that investment in ordinary shares calls for special skills and unremitting attention which relatively few people possess or can spare time for'. No statistical tests can be devised to test the quality of management, yet the welfare of a company is largely dependent on it.

The main considerations for and against reforming the law on the range of trustee investments are, on the one side, the chance of a higher income and the greater preservation of the real value of the funds, and, on the other, the greater safety, in the monetary sense, of the narrowly defined investment scope, but the problem is wider than that. At the moment all funds held under trusts where the instrument does not specifically allow greater freedom are concentrated in one part of the market, with the result that money can be borrowed more cheaply by government and industry[19]: the trustee security market is depressed. The Chancellor of the Exchequer may so arrange his budget that money is attracted into industry,[20] but would he allow money, which the government could otherwise borrow cheaply, to go into the same field? Even if it is argued that failure to reform the law for this reason would amount to prejudicing the interests of the poorer class of the community, which enjoys the income of funds held under trusts without wide powers of investment, for the sake of the community as a whole, the Chancellor would have to take great care not to upset the financial balance of the country, to the prejudice not only of the

[18] Bickford, 'The Outlook for Business and Trust Investment Securities' (1953) 33 *Trust Bulletin*, November, p. 15 at p. 17; H. Bell and H. Frame, *loc. cit.*, note 11 above at p. 85.

[19] Woodruff, 'Legal and Investment Standards of Trustees' 4 *Fordham Law Review*, p. 391 (not available in England); abridged, Powell, *Cases on Trusts* (1940), p. 644, and Powell's comment, footnote 12.

[20] *E.g.*, the reduction of the bank rate in September, 1953, and the abolition of Excess Profits Levy in the budget of the same year.

whole community but especially that of the beneficiaries themselves, whose money might be invested at a time of instability.[21]

But before speculating further on possible law reforms, it may be of interest to consider what has been done recently in the United States.

AMERICAN LAW AND PRACTICE

At the time of the South Sea Bubble the only rule in force in America was that the trustee was under a duty to choose his investments with due care.[22] This has been interpreted in two main ways in the different States. Firstly, under the prudent man rule the trustee must consider the relevant circumstances of the trust, including the state of the trust portfolio; he must diversify not only as regards the area in which he invests and the actual debtors, but also as to the type of scheme in which he places the beneficiary's money. Unless the security is readily marketable, he must see that the redemption dates are not later than the probable termination of the trust, he must not speculate, but must hold the scales evenly between tenant for life and remainderman, and so forth.[23]

But in some States, such as New York, a further rule was evolved. It was held there that no prudent trustee would invest in corporate bonds or equities, and instead, the courts evolved a narrow list of trustee securities. When one considers the paucity of large fortunes for investment in the years of rapid pioneering over the continent, it is hardly surprising that there was little authority in many of the States to determine the application of the further rule. The result was that, in many, legislation was passed[24] allowing the trustee to invest in certain securities, sometimes to the exclusion of all others, sometimes merely placing the onus of justifying the investment outside the legal list of the trustee. In yet other States the matter was left vague.[25]

21 But when the equity market was opened to trustees in New York, the greater proportion of money permanently invested steadied the market, 'New York Trustees Swarm into Stocks' (1950) *Business Week*, December 16, p. 106.

22 Keeton, 'Trustee Investment and the National Investment Policy', (1953) 128 *The Accountant*, p. 390.

23 *E.g., Restatement Trusts*, s. 227 (m).

24 Three-quarters by 1936, Note 'Statutory Specification of Trustees' Investments', 49 *H.L.R.*, p. 821 at p. 824, footnote 24.

25 *E.g.*, King, 'Trust Investments in Texas', (1945) 21 *Texas Law Review*, p. 223.

Most of the legal lists allowed investment in[26]:—

(1) Federal State loans or those so guaranteed.
(2) Obligations secured on improved land.
(3) Funds of municipalities and their subdivisions.
(4) Many States also allowed the securities of quasi-public corporations, such as gas and railroad corporations, usually subject to limitations.
(5) Local conditions induced legislatures to add securities of building and loan associations, obligations of federal and joint stock land banks, and the secured paper of irrigation districts.

There have been some interesting developments in some of the States with mandatory lists of trustee securities.[27] In Indiana, the court may give permission to invest outside the usual range of securities. This seems to be rather a clumsy method of extending the list, as presumably only in the case of a large trust would the benefit derived from the proposed investment warrant the expense of an application. Further, there is no reason to suppose that a judge, trained to weigh up conflicting views on the evidence before the court, is the best person to decide whether a proposed investment would be sound.

But in Idaho and Washington, before the adoption of the prudent man rule, such power to approve wider investments was delegated to finance commissioners. This refinement was a great improvement, as the commissioners would have far greater knowledge of the specialised field, and the expense of expert witnesses to advise the court would be avoided.[28]

However, these two States have since adopted an unrestricted list, and as this is now true of over half the States,[29] let us see what rules do still bind the trustee under the prudent man rule. In some States, of which Massachusetts is the most important

[26] Freifield, 'Investments of Trust Funds', (1931) 5 *University of Cincinnatti Law Review*, 1 (not available in England); abridged Powell, *op. cit.*, p. 639, footnote 7.

[27] (1936) 49 *H.L.R.*, p. 821 at p. 823. The other States there mentioned have now adopted the prudent man rule—below, p. 154 *et seq.* But in Delaware the courts refused to give approval in advance, rendering the statute of little use. (*Re Conwell*, 13 Del. Ch. 55; 115 Atl. 309.)

[28] In New Hampshire a board of investment acting in conjunction with the banking commissioner can, within limits, prescribe legals for saving banks. White and Lawres, 'Modernisation of Legal Lists' (1938) 5 L. & C.P., p. 386 at p. 390. In 1949 the legal list was liberalised, but the prudent man rule has not yet been adopted.

[29] Below, p. 154.

example, no legal list was evolved by courts or legislature. Nevertheless, the trustee had to exercise due care in selecting his investments. A large branch of case law has been concerned in defining the matters which the trustee should consider, although any one matter may be neglected after due consideration. Indeed some of the matters mentioned in the *Restatement*[30] might well clash.

In *Dickinson's Appeal*,[31] the Supreme Court of Massachusetts held that the trustee must diversify the investments. Investment of too large a proportion of the funds in one field of enterprise is dangerous. Suppose all the funds are invested in oil, and a new fuel is discovered, oil shares may tumble and a disastrous loss be sustained. It is wise also to vary the district in which mortgages are situated, or business carried on, as decline in one industry may affect others in the neighbourhood. A further diversification should be made as to the dates of maturity. Unless the trust is to last for a fixed time and the termination coincides with the date of maturity, the trustee should consider what the probable state of the market will be then, as if all the funds have to be reinvested at once it may be difficult to do so in a good and well diversified manner.[32] Another point which the trustee should consider is the marketability of the investment. Shares in private companies are often almost impossible to sell for their true value, partly because a sale involves valuing all the assets of the company,[33] and partly because a sale of a small proportion of shares will not carry control of management and the purchaser will be able to do little if the directors are inadequate. A further diversification must be made between the types of investment—equities where permitted, preference shares, and bonds.[34]

30 *Restatement Trusts*, s. 227 (m).

31 (1890) 152 Mass. 184; 25 N.E. 99; 9 L.R.A. 279; Powell, *op. cit.*, p. 631.

32 *Restatement Trusts*, s. 227 (m), (1)–(5).

33 Often a difficult matter. The depreciation formulæ adopted by accountants often yield results with little relationship to the market value of the assets. *E.g.*, the revaluation of I.C.I.'s assets in 1951, footnote 12 above, *Re Holt, H.* v. *I.R.C.* [1953] 1 W.L.R. 1488.

34 Fledderman, 'Comment, Prudent Man Investment of Trust Funds during inflation', (1951) 39 *Californian Law Review*, p. 380 at pp. 391–392. Also Field, C.J., in *Re Dickenson* (above note 31): 'Our cases, however, show that trustees in this Commonwealth are permitted to invest *portions* of trust funds in dividend paying stocks and interest bearing bonds of private business corporations, when the corporations

The trustee's next duty is to make the property productive for the immediate beneficiary, without risking the capital to the detriment of the remainderman; a difficult balance to maintain! His investments must not be speculative.[35] Buying on a margin is cut out by this rule. He should not hold property waiting for a capital rise in value,[36] as the tenant for life of the fund will be deprived of income, nor with the same end in view should an unnecessarily large part of the fund be invested in short term securities. That is the function of the speculator, not the trustee. When buying common stock, he should choose seasoned companies,[37] with large reserves, which for years have fluctuated little on the stock exchange, apart from the general fluctuations affecting all equities. He should also see that the dividend yields have been fairly steady, and that the ratio of preference shares to equities is not over large. Unsecured loans are frowned upon almost everywhere[38] and, indeed, in many States security must be over land.

The rule is that the trustee must keep the principal as secure as is consistent with producing a sufficient income for the tenant for life; but it has to be decided whether, in periods of inflation, the monetary or real value of the capital is to be kept up. The answer given by those who have written on the subject seems to be a compromise. In the 1938 volume of *Law and Contemporary Problems,* Mr. Headley argued that the trustee was not bound to preserve the real value of the fund.[39] It is interesting to notice that the 1952 volume contains a paper[40] which shows that although the real value of stocks rose with the rising

have acquired, by reason of the amount of their property and the prudent management of their affairs, such a reputation that cautious and intelligent persons commonly invest their own money in stocks and bonds as permanent investments' (italics added). Cf. Loring, *A Trustee's Handbook* (Rev. Shattuck, 1940), pp. 165 and 167. See also p. 152, below.

35 Loring, *op. cit.*, p. 156 (1); (1951) 39 *Californian Law Review,* p. 380 at p. 389.

36 Cf. Bickford, 'Outlook for Business and Trust Investment Securities', (1953) 33 *Trust Bulletin,* November, p. 15 at p. 17.

37 Loring, *op. cit.*, p. 156 (2); *Restatement Trusts,* s. 227 (f) (2); Scott, *Trusts* (1937), s. 227·11, p. 1219; (1951) 39 *Californian Law Review,* p. 380 at pp. 388–391.

38 Loring, *op. cit.*, p. 158 (9); *Restatement Trusts,* s. 227 (1).

39 Headley, 'A Trustee in a World of Changing Values', (1938) 5 L. & C.P., p. 355 at p. 365 *et seq.*, a view he still holds for want of a unit more stable than the dollar. 'Trustees as Conservators', (1950) 29 *Trust Bulletin,* March, p. 15 at pp. 23–31.

40 Torrance, 'Legal Background, Trends, and Recent Developments in the Investment of Trust Funds', (1952) 17 L. & C.P., p. 128 at p. 143 *et seq.*

prices, there has in the last century often been a gap between the two. The writer, Mr. Torrance, also mentioned that even the partial success of the equity market as a whole required careful timing and a certain amount of luck. How then can the trustee be expected to do what few men can do and preserve the real value of the fund, especially if it be too small for much diversification? The trend behind all the papers in the volume on institutional investments[41] seems to be that most institutions divide their portfolio between equities, which might be expected to increase in monetary value during inflation, and bonds, which secure some income during deflationary periods, usually associated with depression.

Now that most of the States adopt the prudent man rule[42] the problem as to the proportion of equities in the portfolio has become very acute in the United States. Should the trustee, now allowed to invest in equities, do so in an attempt to preserve the real value of the trust fund as far as may be? Or should he continue the old conservative policy?[43] It seems that the lowest rate of income on bonds has passed for the time being, there, as here, and the experts seem to think that equities may have reached their peak as regards dividends. A slight recession has again been forecast for the United States in 1954. It may further be argued that the beneficiary is usually unable to earn, by reason of age, youth, or lack of experience, and it is not with such people's property that chances should be taken. The young man making good takes chances and can stand occasional setbacks, but with maturity and age few people want to take risks, but think rather of enjoying their earnings in security.

But the problem is not whether security should be sought, but how. 'Safe deposit boxes of this past generation have been leaking values as though they were open to pilferers. [Security] does not reside in government bonds; government bonds have been, in this generation, passports to diminishing equivalents. . . . Even the almighty dollar is made of material which can shrink . . . bars of gold are the bright playthings of political administrations'.[44] Indeed the very conception of 'gilt-edged'

[41] Winter, (1952) 17 L. & C.P.
[42] See p. 154, below.
[43] (1951) 39 *Californian Law Review*, p. 380.
[44] Shattuck, 'Whither American Trusteeship?' (1950) 29 *Trust Bulletin*, March, p. 3 at pp. 10 and 13.

seems to have evaporated on both sides of the Atlantic. The Victorian invested in English government stock which was fixed to sterling and so to gold. But now that finance has become a political matter, part of the process of levelling the standard of living, consols have fallen, even measured against the inflated pound.[45] One result is that foreign investors are looking rather to the overseas markets of the Commonwealth and America, where the dollar, though inflated, has not deteriorated at the same rate as the pound, thereby speeding the inflation of sterling.

One result of the tendency has been considerable hardship to those with fixed incomes. Many people now enter pension schemes, mostly based on life insurances. They pay in part of their wages, but by the time they draw their savings the yield, in terms of purchasing power, has depreciated. True, unnecessary chances should not be taken with such funds, but when security is evanescent the problem becomes one of the lesser risk.

Where it arises under the normal settlement, the difficulty has to some extent been avoided in the United States by drafting clauses in the trust instrument, allowing the trustee a discretion to pay the tenant for life, in whom the settler was probably more interested,[46] an extra sum out of capital, when the family needs it in an emergency, or its standard of living has been reduced.[47] This saves the trustee from the temptation to risk the capital by hazardous investment, and so is probably almost as much to the advantage of the remainderman as to the tenant for life. Still, unless the fund is bearing a reasonable rate of interest, it may be quickly consumed by such payments, to the disadvantage of the immediate beneficiary as well as the remainderman. So, if equities do yield better rates of interest, coupled with a possibility of capital increase, even if insufficient to keep pace with inflation, surely it is to every one's advantage that they should be bought! In America it has lessened the problem of the trustee who has invested wisely in them.[48] But such purchases are no panacea and the lazy or unlucky investor may find himself in

[45] On December 16, 1950, 4 per cent Consols stood at 103. By December 27, 1951, they had fallen to 89.

[46] White, 'A Trustee's Investment Dilemma', (1952) 32 *Trust Bulletin*, September, p. 3 *et seq.*; Headley, (1938) 5 L. & C.P., p. 355 at p. 364.

[47] Owing to the levelling of riches this century, few beneficiaries enjoy large incomes, (1950) 29 *Trust Bulletin*, March, p. 3 at pp. 7 and 8.

[48] B. H. Torrance, *loc. cit.*, note 40 above, at p. 143 *et seq.*, especially pp. 148 and 149.

Queer Street. The courts do not look at investments with hindsight, and surcharge a trustee only when the investment was plainly foolish. Of course, when the trust is such that large sums of cash may have to be found at short notice equities are dangerous, owing to the general market fluctuations, which are considerable over short periods, though small over the decades. If equities are sold when markets are temporarily depressed they may cause a large loss. They should be treated as non-liquid investments. This may account for institutions which have to fulfil solvency tests not investing greatly in common stock.[49]

So far we have assumed that the purchase by the trustee was an 'investment' in the true sense. Over here, in *Re Power, Public Trustee* v. *Hastings,*[50] it was held that a house could not be retained for the occupation of the tenant for life, as that was not an investment. But certain other ways of making the fund productive are cut out by this rule. There, as here, the trustee may not risk the fund by putting it into a trade or business.[51] To the objection that the purchase of commercial equities amounts to investing in trade, the answer is that not every type of common stock qualifies as an investment. The company must be fairly large, having huge reserves to lessen the risk of loss due to under-capitalisation and allow the company to diversify the risk. In fact only a small portion of the equity market has achieved investment status, 'generally defined as the ability to earn an adequate return and pay dividends over long periods of time without interruption or great variation in amount and a lack of great fluctuation in market price except in response to general market and business trends'.[52]

A further rule preventing the trustee from making certain investments is that he must retain control: *delegatus delegare non potest,* a trustee cannot delegate the discretion which the settlor has given to him because of the confidence he reposed in him personally. When one remembers the large number of corporate trustees,[53] in whose judgment, necessarily exercised

[49] Guthman, 'Institutional Investment and the Problem of Equity Financing', (1952) 17 L. & C.P., p. 172 *et seq.*

[50] [1947] 1 Ch. 572.

[51] Loring, *op. cit.*, p. 156 (3); *Restatement Trusts,* s. 227 (f); (1950) 29 *Trust Bulletin,* March, p. 15 at p. 26. See note 39 above.

[52] (1951) 39 *Californian Law Review,* p. 380 at p. 389.

[53] Review, Marsh, 'Corporate Trustees', (1952) 214 L.T., p. 237; Sykes, 'Trust Corporations', (1929) 14 *Conveyancer* (O.S.), p. 99.

through agents, the settlor cannot have reposed much confidence, this may seem to be a slightly outworn idea. Perhaps, in this era of specialisation one could hardly expect the maxim to retain its full vitality.

When it has been suggested that trustees should be allowed to place the trust funds in investment companies, it has been objected that such a proposal is bad on the ground that the trustee loses his control over the fund. A common type of scheme is that in which the company buys certain shares and then sells certificates, representing an *aliquot* share of them to the investing public. Under some schemes the company cannot alter the investments, so it is impossible to sell only one of its holdings. To overcome this difficulty the more usual course is to give the company power to change the investment.[54] The objection to these 'open end' schemes is that they are liable to abuse and the trustee has little control over the investment. Of course, before a trustee could acquire such certificates, he would have to see that not only were the company's fees not excessive, but also that the investments which the articles of the company allowed were of the type which a trustee might acquire. It would seem that the lack of control and the loading fee would make such an investment unsuitable for the large fund. But such schemes do allow the trustee of a small fund to diversify his investments and where the trustee has little financial experience, the greater knowledge and skill of the investment managers would be worth the fee which must, nowadays, be paid for any professional advice.[55]

In the United States, where the banks play a leading part in trust administration, many States allow corporate trustees to set up common trust funds,[56] the portfolio of each fund of which the corporation is trustee, buying a proportionate share of the common fund. This must be done by statute, as otherwise such schemes contravene the rule as to earmarking the individual trust securities.[57] The usual form of such statutes is to allow trust

[54] 'The Investment of Trust Funds and Modern Investment Trusts'; *ibid.*, pp. 84 *et seq.*, 103 *et seq.*; Kissen and Williams, *Investment in Stocks and Shares*, 1933.

[55] Unit trust schemes are subject to certain Board of Trade Regulations; Prevention of Fraud (Investments) Act, 1939, s. 16.

[56] These are *not* the same as the 'common good funds' discussed in the *Nathan Report*, Chap. 15.

[57] 'Trusts—Earmarking Trust Securities—nominee Statutes', (1952) 27 *New York University Law Review*, p. 687.

companies to maintain a common trust fund for the moneys of which it is trustee. The scheme, then, can be used only by the corporate trustee, but within that limit, it allows proper diversification of small funds under expert management.[58] This possibility may influence the settlor of the small trust to choose a corporate trustee. In 1942 these schemes were legal in only sixteen States, but by September, 1953, they were authorised in forty.[59] In 1947 a new regulation of the Federal Reserve Board increased the limit of participation of each estate to $50,000,[60] so such schemes are more useful than before that date. By 1953 the total assets of such funds exceeded a thousand million dollars.[61]

There are of course many other matters which the trustee, wishing to invest, must consider: the needs of the beneficiaries, the probable termination of the trust and the maturing dates of the securities and the probable state of the market at that time. Many of these matters are set out in the *Restatement*.[62]

In the United States, by 1940 most of the legal lists had become very restricted, as many securities had failed to fulfil the statutory tests during the depression of the 'thirties, while the amount of trust funds had increased considerably. Investments could be found only because of the large number of government obligations, then placed on the market; but these yielded a very low income. Many corporate trustees therefore agitated for the liberalisation of the legal lists and the adoption of the prudent man rule.[63]

The volumes of the *Annual Survey of American Law* between 1942 and 1951 show a continuous and mounting series of statutes adopting the prudent man rule—either in its entirety, or in part, as in New York, where the trustee may invest up to 35 per cent of the fund in equities. Twenty-four States adopt the prudent man rule in its entirety, and eleven more have gone

[58] Scott, *Trusts* (1939), s. 227·9, p. 1215 *et seq.*

[59] Torrance, *loc. cit.*, note 40 above, at p. 161; Orcutt, 'Common Trust Fund Provisions', (1953) 33 *Trust Bulletin*, September, p. 27.

[60] (1945) *Annual Survey of American Law*, p. 1002, footnote 59. Now all the forty States which authorise such funds meet this limitation. Orcutt, *loc. cit.*

[61] Cocke, 'Are Common Trust Funds Practical for Small Trust Institutions?' (1953) 32 *Trust Bulletin*, May, p. 15. See also (1953) 33 *Trust Bulletin*, December, p. 34 at p. 35.

[62] *Restatement Trusts*, s. 227 (m).

[63] Note, (1948) 23 *Washington Law Review*, p. 78 at p. 79.

far towards doing so. Only nine restrict investments to bonds.[64]

Perhaps the change by New York in 1950 was the most significant, although it was not complete. New York had long been considered the main upholder of the restricted list. The total value of funds administered there is unknown. Mr. Stevenson estimated it at $13,500,000,[65] of which probably about 20 per cent had been limited to trustee investments.[66] Another estimate[67] was that the change affected about four thousand dollars worth of trust funds. The restriction to 35 per cent of the fund is not so important as it seems at first, since under the prudent man rule, the trustee must diversify between the type of security held, and may not invest solely in equities.[68] It seems that where there is no restriction, nowadays investments of between 50 and 60 per cent in common stock are advisable, unless the fund is likely to be liquidated suddenly.[69] Obviously, these figures would vary with the state of the market: when bonds yield little, more would be invested in ordinary shares, while when inflation was slight and bond yields good, less would be put into the riskier stock. Further, owing to the skill required for successful equity investment, corporate trustees, with their experienced staff, might be expected to hold a higher proportion of stock than the less experienced private trustee.[70]

Some States, such as California, which have newly adopted the prudent man rule, are wondering whether the trustee is now under a duty to make use of the newly opened investments.[71] Some trustees, conservative by nature and now by long habit, are unwilling to go into the equity market.[72] The investment of other trust funds in the equity market will presumably improve the bond market, but even so, why should the beneficiary not

[64] See p. 154, below.
[65] (1948) 27 *Trust Bulletin,* April.
[66] (1950) 42 *Banking,* May, p. 54.
[67] 'For Trust Funds, Bonds or Stocks?' (1952) *Business Week,* May 3, p. 116.
[68] See p. 147, above.
[69] White, 'Protecting the Trust Beneficiaries', (1952) 176 *Commercial and Financial Chronicle,* p. 1328, also various articles in (1953) 32 and 33 *Trust Bulletin.*
[70] *Nathan Report,* s. 288. 'Ultimately, the only true protection for the maintainance of the real value of the trust fund is the honesty and competence of the trustee'. Cf. comment thereon, (1953) 128 *Accountant,* p. 3.
[71] (1951) 39 *Californian Law Review,* p. 380 at p. 388.
[72] Shattuck, *loc. cit.,* note 44 above, at p. 6.

have a fully productive fund?[73] The object of the new legislation would be frustrated if the new powers were not used to a reasonable extent.

ENGLISH LAW REFORM

To return to the English stage, it is submitted that in a highly industrialised community, such as ours, the prudent man rule is the most suitable. In the United States the States restricting investment to bonds lie mostly in mountainous and agricultural areas. But the inexpert trustee might be helped if a commission of financiers could be set up,[74] which would meet periodically to list securities. There might be three lists. The first would be gilt-edged. The second would be of market leaders, those companies which hold the leading position in each field of enterprise and, by reason of their immense assets and general economic power, are reliable investments for those without the skill or time to study the market with care. Then perhaps there would be a third list of seasoned companies which, however, were not market leaders.[75] Administrative difficulties could be lessened by allowing companies to submit claims for inclusion on the list. The lower premium for underwriting the next issue of shares would prove a strong inducement to directors to make applications.[76] It would probably not be necessary to enact that trustees must invest part or all the fund in listed securities. The threat of surcharge on the ground of negligence would be a strong deterrent to an inexperienced trustee intending to invest widely in unlisted securities.

However, my advocacy of the prudent man rule for English trustees is not dependent on the creation of such a board.

[73] *Ibid.*; *Restatement Trusts*, s. 227 (e): 'It is not ordinarily the duty of a trustee to invest only in the very safest and most conservative securities available'; Shattuck, *loc. cit.*, note 44, above.

[74] Cf. p. 144, above.

[75] The expert investor will often look for expanding companies operating in a growing trade. This means buying when trends have become apparent, but not yet so obvious as to have rocketed market prices. Large issues may now be taken up by a few large institutions, without being offered to the public, though the practice has been so unpopular on the stock exchange that it is not adopted in Great Britain. This means that the private trustee must buy his chips before they become too blue.

[76] Such a proposal is liable to criticism on the ground that it has a monopolistic tendency. But which is more important, the security of the small trust funds, the chief beneficiary under the scheme, or the formal prevention of monopolistic tendencies?

Draftsmen of wills and other trust instruments nearly always insert wide investment clauses and the courts now tend to interpret them more liberally.[77] The importance of the reform of a rule which can be avoided by the settlor is mainly for the small trust, made by the poorer man who does not go to a solicitor or appoint a professional trustee. But it must not be forgotten that the existence of a legal list must set up a standard of prudent investment for the inexperienced man, even for his free capital. He decides to 'play safe and buy trustee securities'.

Such legislation would, however, be difficult to pass through Parliament. The American statutes have been passed only owing to the pressure exercised by corporate trustees,[78] and there, where statutes have been passed piecemeal in the different States, the effect on the market of the newly released funds was not so sudden.[79] With the large amount of trust funds now held by the banks and other corporations,[80] should they not supply the motivating force for the abrogation of our legal list?

38 States Authorizing Common Trust Funds

Alabama	Idaho	Mississippi	South Dakota
Arizona	Illinois	Missouri	Tennessee
Arkansas	Indiana	Nebraska	Texas
California	Kansas	New Hampshire	Utah
Colorado	Kentucky	New Jersey	Vermont
Connecticut	Louisiana	New York	Virginia
Delaware	Maine	North Carolina	Washington
District of Columbia	Maryland	Ohio	West Virginia
Florida	Massachusetts	Oklahoma	Wisconsin
Georgia	Michigan	Oregon	
	Minnesota	Pennsylvania	

24 States Following Prudent Man Rule

California	Kansas	Minnesota	Rhode Island
Colorado	Kentucky	Missouri	Tennessee
Connecticut	Maine	Nevada	Texas
Delaware	Maryland	New Mexico	Utah
Idaho	Massachusetts	Oklahoma	Vermont
Illinois	Michigan	Oregon	Washington

[77] Withers, 'Implied Limitations of Wide Investment Clauses', (1952) 213 L.T., p. 44.

[78] Note, (1948) 23 *Washington Law Review*, p. 78 at p. 79. Mr. Shattuck drafted a model statute adopting the Prudent Man Rule and prepared a booklet on the subject for the Trust Division of the American Banks Association, Headley, *loc. cit.*, note 39, above.

[79] But the new capital should steady the market, note 21, above.

[80] Review, 'Corporate Trustees', (1952) 214 L.T., p. 237; Sykes, 'Trust Corporations', (1929) 14 *Conveyancer* (O.S.), p. 991.

11 States Which Have Moved Towards the Prudent Man Rule

Nebraska	New York	Ohio	Virginia
New Hampshire	North Carolina	Pennsylvania	West Virginia
New Jersey	North Dakota	South Carolina	

9 States Restricting Legal Investments to Bonds

Alabama	Indiana	Louisiana	Wisconsin
Florida	Iowa	Montana	Wyoming
Georgia			

4 Possibly Restricting Investments to Bonds

Arizona	Arkansas	Mississippi	South Dakota

CONSTITUTION-MAKING IN BRITISH GUIANA

G. W. Keeton

The suspension of the Constitution of British Guiana at the beginning of October, 1953, has focussed attention in Great Britain upon a constitutional experiment, initiated after the war, which has for the moment failed to achieve its aims. Since there are important lessons to be learned from this failure, it is profitable to examine it more closely in order that similar mistakes may be avoided in guiding other colonial territories towards self-government. The recent crisis in British Guiana has demonstrated in striking fashion that good intentions on the part of the colonial power are not enough, if the will to work the political institutions is not present. It should also be pointed out that there have been suspensions of colonial—or even of a dominion —constitutions in the past. In the inter-war period, and in consequence of economic depression, the Dominion of Newfoundland asked for its constitution to be suspended. Thereafter, for some years, it was administered by a commission. At the end of the Second World War, the electorate decided, by a narrow majority, to become a province of the Dominion of Canada. Malta, too, since 1920 has been the scene of a succession of constitutional experiments.

No account of the successive constitutional experiments in British Guiana can expect to be intelligible without some reference to its geography and history. It is a territory of 90,277 square miles, *i.e.*, equal to England, Scotland and Wales. It is situated entirely within the tropics, just north of the Equator, on the northern coast of South America. To the west is Venezuela; to the east, Dutch and French Guiana. For centuries it has been a sugar-growing area, although there is an abundance of good timber in the, as yet, unopened hinterland. The colony is, for practical purposes, a coastal strip of 200 miles in length and for the most part of very shallow depth, adjacent to the mouths of several important rivers, within which are sugar plantations and rice fields, and behind which lie virgin forests.

In this coastal strip are situated the only important towns, of which the largest, the capital, is Georgetown. The population of the entire colony is still numbered in hundreds of thousands, of whom a considerable number are completely illiterate aborigines. So recently as 1915, the total non-aboriginal population was less than a hundred thousand, and included in that modest total there were Europeans and Eurasians, mainly of British, Portuguese and Dutch descent; there were also immigrants from the West Indies, Indians from India and the East Indies, Chinese and Negroes. Many of the latter were contract-labourers in the sugar plantations, or their descendants. There has been considerable intermixture of races, especially of the non-European races. To-day, the population is approximately 450,000, of whom about 80,000 live on the sugar estates. In recent years, the rate of natural increase has doubled, more particularly amongst the East Indian population which comprises 88 per cent of the labour on the sugar estates. From 1960 the housing of families made up of those who have been born during the past fifteen years will be a problem of major importance for the government of the colony. It should be mentioned, however, that since the war there has been house-building on a considerable scale on the sugar plantations.

The land used for the growth of sugar is at or below sea-level. In consequence, dykes, irrigation and draining constitute a heavy overhead charge, making British Guiana sugar 4 per cent dearer than other West Indian sugar. It is grown on a score of large plantations, one of which is responsible for about 70 per cent of the output.

The constitutional history of the colony has been as remarkable as its racial structure. Writing in 1936, Sir Cecil Clementi, himself a colonial administrator with a liberal outlook, and with practical experience of the colony's problems, says that the constitution which existed prior to 1928 'was a freakish by-product of the Napoleonic Wars and the creature of pure mischance; but it well deserves special study as a signal illustration of the danger involved in a premature grant of representative institutions and in the control of finance by elected legislators not charged with administrative responsibility. Moreover, in British Guiana we may watch the wheel of constitutional change turn full cycle, from strict control by the

Crown to a system which was a parody of self-government, and thence back again to an advanced form of Crown Colony government. Here we may learn how the commercial adventure of a Dutch trading company grew to be a colonial administration, how Dutch methods of colonising were gradually modified under British rule, how representative institutions on too narrow a basis proved incapable of healthy growth, how an oligarchy of sugar-planters came to be a Negro demagogy, how an autocratic executive was by degrees so emasculated that it could no longer rule, and how at last the scandal became such that Parliament was obliged to intervene, in order to sweep away the constitutional eccentricities which impeded the progress of British Guiana, and restore to its Government the power of governing'.[1]

Evidently the wheel of constitutional change is still turning. Similarly the pendulum is still swinging between the planters on the one hand and the non-European demagogy on the other.

The first settlements in Guiana were established by the Dutch, following their separation from Spain, at the beginning of the seventeenth century. The Dutch West India Company was formed in 1621 with monopolistic privileges similar to those of other great trading companies of the period. These included powers to negotiate treaties with native princes, and to govern the areas settled. A limited number of trading posts were established, and a few colonists went out from the Netherlands. By the middle of the seventeenth century, a beginning had been made with the cultivation of sugar-cane. By the Treaty of Westphalia in 1648 portions of Guiana, designated by the names Berbice and Essequebo were formally recognised as Dutch possessions. Out of these there gradually emerged the settlements of Demerara and Essequebo, which by the middle of the eighteenth century had already attracted British settlers from West Indian islands, who had engaged in the sugar industry. During the latter stages of the American War of Independence, Holland joined the Armed Neutrality of the North and Great Britain declared war on her. One consequence of this was Demerara and Essequebo capitulated to the British West Indian fleet. This was in March, 1781, but the British occupation on this occasion was short, for on February 3, 1782, the British occupation authorities in turn capitulated to a French fleet, and the two

[1] *A Constitutional History of British Guiana,* 1936, p. vii.

colonies returned to Dutch rule by the Peace of Paris, 1783. For the next few years, there were constant disputes between the colonists, the Dutch West India Company (still the ruling authority) and the States-General of the Netherlands. The Company, however, was heavily in debt, and was unable to undertake the developments desired by the States-General which therefore, in 1791, took over the liabilities of the Company and with them the government of the two settlements, now united into a single colony. However, direct rule from Holland was of brief duration. Already the French Revolution had plunged Europe in a general war, in which Holland was directly involved. In 1795, she was compelled to range herself alongside France, with the result that in 1796 a British expedition occupied the colony. The colonists profited directly from this event, for they were granted the same commercial rights and privileges as the British West-Indian colonies, whilst the occupying Power scrupulously preserved the laws and system of government which the Dutch Government had introduced. As yet, the intention was to restore the colony to the Dutch at the conclusion of the war, and this retrocession actually occurred by the Treaty of Amiens in 1802. However, the new Dutch Governor had scarcely set foot in the colony when the war with Napoleon was resumed, and Holland was again involved on the side of France. In September, 1803, yet another British expedition arrived, and once again the colony capitulated. This time the cession was permanent, for it was confirmed by treaty in 1814, and no change in the allegiance of the colony has occurred since that date.

By the terms of the capitulation, the laws and usages of the colony were to remain in force, and the inhabitants were guaranteed freedom of religion. For some years after the final cession there was no change, other than that of allegiance, in the legal or constitutional status of the colony. Indeed, until 1812, the Dutch planters held a monopoly in its main governmental institutions. An important and far-reaching change occurred in 1831, however, when the colony of the Two Rivers, comprising Demerara and Essèquebo, was united with Berbice, another adjacent settlement acquired by Great Britain from Holland at the same time as the more prosperous colony, to form the single colony of British Guiana. As Berbice had enjoyed a quite separate history, and had evolved its own institutions, important

constitutional changes were inevitable. These resulted in the establishment of a Court of Policy to assist the Governor in legislation, with five official and five unofficial members, the latter being nominated by an electoral college, which in turn was elected by the planters. At the same time a Supreme Court of Justice, comprising a Chief Justice and two other judges, all professionally qualified, was set up for the colony. This was a change of considerable importance as the common law of the colony was Roman–Dutch law.

Two years after the introduction of these reforms, the social and economic structure of the colony was vitally affected by the Act of Parliament abolishing slavery in all British colonies. It created a free non-European population who, for some time to come, were excluded from all share in government, but for whom it would be necessary to provide both employment and government, for before liberation both were provided in the plantations. Accordingly, the functions of government extended, and its cost greatly increased. This, in turn, produced recurring friction between the colonial administration and the planters on the nature and extent of the taxation to be imposed, and which was necessary to pay for the growing public services. For some years the Combined Court (which had replaced the old Court of Policy as the colony's legislature) withheld or curtailed supplies necessary for the payment of official salaries, and in 1842 Lord Stanley, then Colonial Secretary, was compelled to say somewhat pointedly in a dispatch that the extreme exercise of power by an oligarchical body might compel the Imperial Government to consider 'whether a system cannot be established by which the interests of the colony would be better secured and permanently provided for'.[2] There was, however, a further factor of importance in this prolonged dispute between planters and government. The Home Government had insisted on the abolition of slavery, whilst it still existed elsewhere in North and South America. From 1846 onwards, however, it also contemplated reducing the duties on foreign sugar, which had previously protected the trade of the British West Indies. Free sugar would thereafter be competing with slave-grown sugar without the assistance of a preference. No wonder the colonies felt that their interests were insufficiently protected at Westminster!

[2] Clementi, *op. cit.*, p. 117.

In the five years immediately before 1850 there was extended discussion of constitutional reform, both in Georgetown and in dispatches between the colonial government and London. There were three possible courses of action: (1) to seek to amend the existing system in an effort to make it work more smoothly; (2) to replace the existing system by Crown Colony government of the ordinary type; and (3) to replace the existing system with representative institutions of the Barbados or Jamaica type. Not unnaturally, in view of recent difficulties, the local government was strongly in favour of Crown Colony government. The Colonial Office, which was busy preparing representative institutions for Australia, New Zealand and South Africa, was willing to consider the possibility of introducing representative institutions in British Guiana, but was deterred by the mixed character of the non-European proletariat. The planters, again as might have been expected, were in favour of such reforms as would make the existing oligarchical constitution work more efficiently, although a few of them were prepared to accept representative institutions with a property qualification for the franchise (such as Great Britain itself possessed at that date). Independently of any general scheme of constitutional reform, the franchise was extended in 1849, but three years later the Home Government disallowed a colonial ordinance which would have provided for the introduction of a constitution modelled on that of Barbados, but with a franchise based on property, and limited to 916 persons out of a total population of 127,695. With an elective majority in the Assembly, and with representation confined to planters, the Crown would have been deprived of effective power. In particular, it would have placed the salaries of colonial officials at the mercy of a body which, in the past, had shown reluctance to make full provision for them. This question was the more important as the Civil List, down to 1928, was voted for short periods—usually five years—only.

It was not until the year 1891 that reform was at last achieved, and the old system of indirect election of unofficial members was abolished. The constitutional change had been preceded by discussions, both in the colony, and between the colony and London, and in an important dispatch written in 1889 the Colonial Secretary, Lord Knutsford, had pointed out that the Legislature ought not to represent a single class, but all

classes who could intelligently exercise the franchise, whilst it ought to be the duty of official members of the Legislature to watch the interests of those who would still be without representation. The ensuing reforms whilst preserving the pre-existing balance between official and unofficial members, increased the number of each, and substituted direct election with a reduced income qualification for the older and cumbrous method of indirect election. Moreover, an Executive Council was created for the first time, and thereafter the ancient Court of Policy became a purely legislative body.

The Constitution of 1891, with only minor amendments, remained in force until 1928, and a franchise survey of 1911 shows that of an adult male population of 93,377 the total number of registered voters was 4,312, *i.e.*, 4.6 per cent as compared with 1.9 per cent in 1850. Even so, however, a striking change had taken place. In 1850, the electorate was almost exclusively European. In 1911, 62.7 per cent of the electorate was of African descent, and only 17 per cent were of British descent. Equally striking was the exclusion of East Indians. Although they comprised 51.8 per cent of the whole male population of the colony, they constituted only 6.4 per cent of the electorate. One more comment must be made upon the pre-1928 constitution. Under the terms of the Capitulation of 1803, control of taxation was reserved to the inhabitants of the colony. This control was exercised through a Combined Court, which comprised the members of the Court of Policy with the addition of certain elected Financial Representatives. It followed, therefore, that government was in a perpetual minority in the Court. The evil consequences of this were described by Sir Cecil Clementi in the following terms:

'The coastal interests dominated the administration: and, not unnaturally, the sugar planters and others whose interests were exclusively on the coast disapproved of spending the colonial revenues or private capital on objects which could not be expected to bring any immediate benefit to that coastal fringe, where all the sugar estates of the colony are situated. Hence the roads and railways are coastal; and the chief works of the colony, both public and private, have been drainage schemes and water-conservancy schemes for the benefit of the plantations and those who live on the coastal flats. Vast sums have been

spent on defending the shore against the inroads of the sea. But any attempt to open up the interior has been looked at askance as likely to withdraw labour from the coast. There can, of course, be no doubt that the greatest asset of British Guiana at the present time is its sugar industry, and that a wise administration will safeguard that industry. Nevertheless it is also beyond doubt that, unless there is proper representation in the colony's constitution for industries established in the interior, the back blocks of this "magnificent province" will remain an unpeopled wilderness'.[3]

These observations were made before the adoption of the 1928 Constitution. Unfortunately, even to-day they still have substantial validity. Before 1928, however, the path to development was blocked by the unofficial majority in the Combined Court, and a commission appointed by Mr. Amery, then Colonial Secretary, in 1926 reported that the time was ripe for change. Accordingly, an Act of Parliament was passed in 1928, providing for a new Constitution to be promulgated by Order-in-Council.[4] By this Order, the normal form of Crown Colony government, with executive and Legislative Councils, was introduced, the old Court of Policy and the Combined Court being abolished. The Legislative Council, as a result of later constitutional amendments, comprised the Governor, three official and twenty-one unofficial members. Of the latter seven were nominated and fourteen elected.

A person capable of being elected must be:

(1) a British subject of 21 years of age; and
(2) qualified to be registered as a voter; and
(3) have at some period before nomination as a candidate, resided in the colony continuously for twelve months; and
(4) able to speak, read and write the English language; and
(5) (a) in receipt of a clear income of at least $1,200 *per annum;* or
    (b) in his own right owner of immovable property in the colony of the value of $1,000 over and above any mortgage or other claim; or

[3] *Op. cit.*, pp. 385–386.
[4] British Guiana (Constitution) Order in Council, 1928 (as amended, 1935, 1943, 1945).

(c) lessee of immovable property for a term of not less that twenty-one years at an annual rent of not less than $300.[5]

To be eligible for registration as a voter a person must have been a British subject over 21 years of age, who possessed one or more of the following qualifications:—

(1) ownership of not less than six acres of land; or
(2) occupation for not less than six months under a written lease of not less than six acres of land; or
(3) ownership of a house or land of a value of not less than $350; or
(4) occupation for not less than six months under a written lease of a house or property on an annual rental of not less than $96; or
(5) possession or enjoyment of an income or salary of not less than $300 a year, together with residence in the electoral district for not less than six months; or
(6) payment of direct taxes of not less than $20 a year during the previous twelve months, together with residence in the district.[6]

The Governor in Council had the usual powers to legislate for the peace, order and good government of the colony, subject to the overriding powers of the King-in-Council, and the powers of disallowance and reservation. Moreover, by Article 62, the Governor was given reserve power to legislate in the interests of public order, public faith or good government, where the Legislative Council failed to do so.

At first sight, the Constitution of 1928 appears to be a step backwards, for it introduced Crown Colony government pure and simple. Such a step was necessary, however, if the Colonial Office was to have overriding powers in financial matters, without which loans could not be granted, nor security for development given. It was an unfortunate circumstance that these constitutional changes were introduced a short time before the depression, and in consequence the expected developments in British Guiana were never undertaken. On the other hand, during the depression years Communism obtained a footing amongst the slums of the coastal towns.

The next chapter in the troubled constitutional history of

[5] Article 21. [6] Article 25.

British Guiana opened at the conclusion of the recent war. Revolutionary changes in the relations between Great Britain on the one side, and India, Pakistan, Burma and Ceylon on the other, brought an insistent demand from other parts of the colonial empire for constitutional progress, sometimes in advance of what the existing situation warranted. In the light, not only of recent events, but also of the past history of the colony the report of the Commission upon the recommendations of which the recent constitution was based[7] showed an optimism which events have proved false. There is a specious attraction about the proposals for self-government based on adult suffrage, which completely ignores the fact that even so recently as 1911, as has been pointed out, a race which was in a numerical majority was completely dominated by the second largest non-European race, *i.e.*, those of African descent. In the intervening forty years, and influenced by the pace of events in India, those of Indian descent have for the first time awakened to their position, with the result that racial tension has been added to the colony's many other problems. A glance at the names of the Ministers who took office with Dr. Jagan will show how great a change has recently come over the face of politics in British Guiana.

The constitution based on the recommendations of the Waddington Commission came into force in April, 1953. It was based on adult suffrage and established a two-chamber Legislature. The lower chamber, or House of Assembly, consisted of twenty-seven members, three official and twenty-four elected; the upper chamber, or State Council, consisted of nine members appointed by the Governor, two of them on the recommendation of the Ministers in the House of Assembly. The constitution also provided that the Ministers, six in number, should have a majority of two in the Executive Council. This meant that in all normal business the Governor must act on the advice of his Ministers, although the Governor was given reserve powers to deal with an exceptional emergency. In case of deadlock between the Houses of the Legislature, the Governor had power to convene a joint session of the two Houses. Here again, it will be noticed, the Ministers, if they had a majority in the House of Assembly, must necessarily also have had a majority in the joint session.

[7] Col. No. 280.

As soon as the new Constitution came into force, a general election on the new franchise was held, and the People's Progressive Party (P.P.P.) gained 51 per cent of the votes, and 18 out of the 24 elective seats. The six Ministers were duly appointed to the Executive Council, and two members of the P.P.P. were appointed to the State Council where, however, this party was in a minority. The P.P.P. was described by the Georgetown correspondent of *The Times* as 'embodying nationalists, grievance-ridden intellectuals and workers, loafers and malcontents'.[8] What is beyond argument, however, is that its leaders sought to subvert the institutions of the colony.

From the moment of their appointment the Ministers appear to have totally misconceived the purposes for which they were elected. Something of the melodramatic nature of the activities of Dr. Jagan and his associates emerges in the record of their activities in the White Paper on the Suspension of the Constitution.[9] For example, the Ministers of Education and Labour started an 'African and Colonial Affairs Committee', which declared support for the Mau Mau in Kenya and the Communist terrorists in Malaya. At the same time the ban on the entry into the colony of Communists and Communist propaganda was repealed. In addition to these activities, two other Ministers, Dr. Jagan and Dr. Lachmansingh, took the leading part in forming a breakaway union (before the recent constitution was enacted), the Guiana Industrial Workers' Union, out of a dissident section of the Man Power Citizens' Association, after these two persons had failed to gain control of the latter union. The result was rioting between these unions in 1948, in which several persons were killed. After the P.P.P. came into power, these Ministers sought to coerce the sugar industry into giving recognition to this breakaway and Communist-dominated union. When this failed, they incited a strike in the sugar industry, which they in turn sought to turn into a general strike. There was, however, little response from other unions, and Dr. Lachmansingh then ordered the sugar workers to return to work after the strike had lasted four weeks. The struggle was, however, continued in the Legislature, where the two Ministers

[8] *The Times*, October 16, 1953.
[9] Cmd. 8980 (1953).

promoted legislation—the Labour Relations Ordinance—aiming to ensure compulsory recognition of this union. The ensuing proceedings demonstrated the real policy of the Ministers. They are described in paragraphs 20 and 21 of the White Paper:—

'On September 24, the day the strike ended, the House of Assembly met. Before the session began, large crowds had been instigated by the P.P.P. and G.I.W.U. leaders to assemble in the vicinity of the Legislative Chamber. While the police were attempting to control them the Minister for Works exhorted them to rush the building. It was soon packed with an unruly crowd and it was some time before sufficient order could be restored for the session to begin. The Minister for Labour then moved the suspension of Standing Orders so that the Labour Relations Bill could be taken without due notice through all its stages that day. The Speaker refused this request on the grounds that such action infringed the rights of the minority in the House, and that he could not permit a measure of such importance to the life of the community to be taken without notice. The Ministers present and other members of the P.P.P. then rose and left the Chamber. Pandemonium broke out amongst the large crowd in the Chamber, which invaded the floor of the House, and order could not be restored for some time. The Leader of the Opposition had to be given police protection on leaving the building. The Party at first threatened to boycott the House until the Speaker reversed his ruling and at a public meeting the Speaker was accused by the Ministers of partiality. Eventually, however, the Bill was debated for several days and passed. These incidents added to the already serious tension in Georgetown which was not relaxed until the arrival of the troops.

'The alarm generated amongst moderate opinion by these developments was reflected in a resolution on September 21 by the State Council, expressing its grave anxiety at the sugar strike and regretting that "certain Ministers of the Crown in the colony had been actively engaged in various parts of the country in promoting and sustaining this strike". The resolution continued "such action by these Ministers of the Crown is a grave danger to the Constitution, a direct threat to the peace and security of the citizens of the colony, and the negation of good and responsible democratic government", and it asked the Secretary of State "after due inquiry to take such action

as he may deem fit to ensure confidence in the Government and the proper and efficient working of the Constitution"'.

Thereafter the situation deteriorated a good deal further, and there was considerable wild talk and irresponsible action from the Ministers. There were direct threats of the use of force, of 'fighting to the end', and there was an attempt to set up a 'People's Police', directly subservient to P.P.P., on the normal totalitarian basis. A situation in which Ministers openly incite the population to break the law is the negation of government; and this state of affairs improved only with the arrival of British warships and troops. This occurred at the beginning of October, 1953, and the Constitution was suspended by the British Guiana (Constitution) (Amendment) Order in Council, 1953, made on October 4.

It must be emphasised that the above account has given only the barest skeleton of the events leading to the suspension of the Constitution. The irresponsible behaviour of the Ministers is set out more fully in the White Paper. This even led to the absurdity of proclaiming an intention to separate from the British Commonwealth by force. Such an objective, even if attained, could only have plunged the colony into complete financial chaos, unless it had been merely a move in some larger international activity—a possibility to which the geographical position of the colony in relation to the Panama Canal lends some colour. Possibly also it was consciousness of this which led Mr. Byroade, American Assistant Secretary for Near Eastern, South Asian and African Affairs, to remind his audience at a meeting in California on October 31 that a new form of Soviet colonialism was taking shape.

Unfortunately the progress of events in British Guiana has had disastrous effects upon plans for further development. As the Georgetown correspondent of *The Times* pointed out, 'one of the most disquieting features of the P.P.P. regime has been the downhill trend of the economy, which they took over flourishing, but which was deteriorating, partly because of lack of confidence and partly through maladministration'.[10] The White Paper[11] lists five large-scale projects for industrial development, which were abandoned owing to the prevailing unsettled con-

[10] *Loc. cit.*, note 8 above.
[11] Page 8.

ditions. This coincided with a sharp decline in trade, and an increase in unemployment.[12]

Before analysing the constitutional crisis in British Guiana to discover what lessons are to be learned from it, it is desirable to mention two further factors which affect it. Side by side with the constitutional changes in British Guiana there have been discussions on the closer association of the British colonies in the Caribbean. In September, 1947, the then Colonial Secretary, Mr. Creech-Jones, presided at a brief conference at Montego Bay, Jamaica. The result was, on the whole, disappointing, but the nucleus of a scheme emerged, which was then submitted to the legislatures of the separate colonies. These, with the exception of British Honduras and British Guiana (and, for special reasons, the Virgin Islands), accepted the principle of federation, and a further conference was held in London in April, 1953, the result being certain modifications of the original scheme, and the elaboration of the main heads of a federal constitution. The rejection of the federal scheme by British Guiana, it should be noticed, occurred before the recent constitution of 1953 was adopted. In these circumstances, it is highly interesting to notice the main points made by the Guianan delegates at the conference in 1947. They pointed out that British Guiana was really a 'continental' country. By this they implied that its future was bound up with that of other States on the north coast of South America. They spoke of its 'vast resources', which awaited development, and added that the colony already had an advanced form of government, and that there was no reason to suppose that full self-government would not be conceded, when they wanted it. Moreover, they stated that although the colony was underpopulated, and would welcome settlers from the West Indian islands as peasant proprietors, there had as yet been no evidence that the overpopulated islands had any desire to send their surplus population to British Guiana. No doubt also the delegates were conscious of the political importance which Jamaica would have in any West Indian federation.

Closely linked with the political question is the economic question.[13] The British Government has already shown that it is

[12] See also 'World Bank Development Plan for British Guiana', *The Times*, January 21, 1954.

[13] *Ibid.* See also Mr. Lyttelton in the House of Commons, February 8, 1954, *Hansard*, Vol. 523, col. 827–828.

fully conscious of this aspect of the matter by sending out Mr. G. Lacey and Mr. F. A. Brown (who was until recently Manager of the Sudan Gezira Board) to report on drainage, irrigation and land settlement. Under the latter heading, Mr. Brown has been particularly concerned with the possibilities of increasing the production of sugar cane by peasant farmers and with the possibility of establishing co-operatives of such small farmers. If such a development is possible, it will introduce a more responsible class of peasant proprietors, the complete absence of which has been an important contributory factor to recent disorders. Beyond this, although the 'vast resources' of the hinterland (the legendary El Dorado) have often been spoken of, the Evans Commission of 1947 introduced a note of caution. There may, of course, be extensive deposits of oil and minerals, but these are as yet unknown. There is timber, including greenheart, which is much used in underwater construction, but there are serious difficulties in cutting and transport, which will take time to surmount. Near the Brazilian border, there are lands suitable for cattle-ranching, but once again transport will have to be developed. Indeed, before any considerable modification of the colony's economy occurs there will have to be a very large capital outlay, and for that, political stability and economic security is an absolute prerequisite. Viewed from this standpoint, the serious damage brought about by the extraordinary events of the past year can in some measure be appreciated.

It can only be a matter for regret that the constitution which has been suspended, and which presumably cannot be reintroduced so long as the present conditions in the colony remain substantially unchanged, was introduced without due consideration of the colony's peculiar political and constitutional structure, and without adequate consideration of the racial tensions to which it is inevitably subject. To regard the present crisis as a conflict between the sugar planters and the unions is a gross caricature, for as we have seen, even so long ago as 1911, the non-European electorate had a controlling influence upon elections to the Court of Policy, whilst the relations of the planters with the unions developed upon familiar lines of negotiations until agitators sought to organise breakaway unions for Communist ends. Enthusiastic advocacy of these aims brought about an association between sections of

the Negro and East Indian electorates. Where this ideology did not ensure conformity, there was racial antagonism. These are not the conditions in which responsible self-government can take root. Moreover, the constitutional crisis posed a problem which will recur elsewhere; *viz.*, must a colonial Power which has introduced an advanced form of self-government stand idly by whilst demagogues exploit these institutions to bring about disorder and the ultimate collapse of the rule of the colonial power? Altogether apart from the legal and constitutional aspects of this problem, it also has international implications which cannot be ignored, and which have not been ignored, either in the United States, or in neighbouring States in South America, which are very directly concerned in any spread of Communism on the South American continent. Moreover, recent events in British Guiana have a direct relation to world strategy, on account of the proximity of the colony to the Panama Canal.

In any appreciation of the position of British Guiana, certain facts from its history are self-evident. The influence of the indigenous population—the South American Indians—upon the progress of events is negligible, if not non-existent. All other inhabitants of the colony have settled there in recent times. They have been drawn there by the enterprise of British and Dutch planters, the former being heavily in the majority. The considerable non-European population are mainly the descendants of freed slaves. So also are some inhabitants of other British possessions in this area, but elsewhere they have shown greater political maturity than in this colony. Even so, however, they are considerably more politically experienced than the inhabitants of East Indian race, who are the descendants of indentured labourers. The task of educating both racial groups in co-operation and political responsibility will not be easy, and for some time to come it will be made more difficult in consequence of friction between the two races. Neverthless political maturity must be achieved if material conditions are to be improved, for without it, capital will not be attracted for development. Moreover, loans and grants[14] from the British Treasury can never be a substitute for industrial development within the colony. One of the most significant facts about the colony which was pointed

[14] *Loc. cit.*, note 12 above.

out by the representatives of British Guiana at the Montego Bay conference, is that although many of the West Indian islands suffer from over-population, their populations have preferred to live under the difficult conditions prevailing in their homelands rather than migrate to British Guiana. If this attitude is to be modified, conditions in British Guiana must be improved. Similarly, British Guiana's conditions would not be greatly improved in a Caribbean Federation. Such a federation would be far less able to face and solve the colony's extremely difficult problems than the Colonial Office is. There is no parallel whatever, for example, with the recently-established Central African Federation. For some years to come, British Guiana must remain a special problem, demanding individual treatment. Moreover, recent events have shown that Colonial Office supervision must remain in some form. Otherwise, resources made available there risk being thrown away. Considerations such as these were obviously in the mind of Mr. Byroade, when he said in California on October 31 last:—

'Let us be frank in recognising our stake in the strength and stability of certain European nations which exercise influence in the dependent areas. They are our allies. A sudden break in economic relations might seriously injure the European economy upon which our Atlantic defence system depends, and at the same time prove equally injurious to the dependent territories themselves'.

In the case of British Guiana, a sudden break would reduce the population to the extreme of misery. With the sugar industry at a standstill the colony would face destitution, and would fail to attract other industries. Long term plans for peasant proprietorship and co-operatives depend in turn upon irrigation, land clearance and the opening up of new land, and these in turn depend upon stable government in place of demagogy. It is only when these conditions are satisfied that the process of building up a self-reliant people with a stake in the colony out of the varied racial strains within the colony will begin.

LAW AND ORDER IN KENYA

DENYS C. HOLLAND

THE pressing need for the restoration of law and order in Kenya is obvious enough. How best to accomplish that object quickly, and with lasting effect is unfortunately not so clear. However, it seems to be accepted by most people, including the Colonial Secretary[1] and the General commanding the troops in Kenya,[2] that force of arms alone will not suffice. Indeed it is generally recognised that force may well have the opposite effect if abused, and recognised also that there are underlying causes of discontent in Kenya which have to be thoroughly examined.[3] The justification for the discontent and the steps to be taken to deal with it, however, are unfortunately not always the subject of such general agreement.

THE DECLARATION OF EMERGENCY

The present state of emergency in Kenya was declared on October 20, 1952. The circumstances immediately surrounding that declaration are, as with so many events in Kenya's history, to some extent obscure. Certain facts, however, seem to be indisputable. On the one hand, it is clear that there was in Kenya an increasing amount of violence at that time; and clear also that there was in existence a movement, known as Mau Mau—whether it amounted to an organised society or not[4]—whose

[1] *Hansard,* Vol. 522, col. 417: 'No one, least of all I, needs to be told that war, or near war, solves nothing'.

[2] *Hansard,* Vol. 522, col. 404, where General Erskine is reported as having said that there was no military answer to Kenya's troubles; it was a political problem, the problem of how Europeans, Asians and Africans can live in harmony on a long-term basis.

[3] *Hansard,* Vol. 509, col. 1228; Vol. 522, col. 417. Since the reading of this paper on January 28, 1954, the Report of the Parliamentary Delegation to Kenya, Cmd. 9081 of 1954, has been published; in this Report various causes of discontent are considered and cases of abuse of power noted.

[4] Mau Mau was in fact declared an unlawful society by the Governor by Order in Council in 1950, and, further, in 1953 Jomo Kenyatta was found guilty before the Resident Magistrate at Kapenguria of managing an unlawful society, namely, Mau Mau (see p. 185, below). Nevertheless, there are still those who maintain that Mau Mau has never amounted to a society in the proper meaning of the word; see, for example, *West Africa,* September 19, 1953, p. 874, where in a review of Colin Wills,

adherents took various oaths, providing, *inter alia,* for the expulsion and the murder of Europeans. In the light of these facts the Governor, Sir Evelyn Baring, was apparently advised, soon after his appointment, that there was in existence not merely unorganised violence by Mau Mau adherents, but an actual conspiracy to organise an uprising. As a result the state of emergency was declared, and an operation known as 'Jock Scott' put into operation during which over one hundred suspected Mau Mau leaders were arrested. However, it has been said by some opponents of the White settlers in Kenya that violent crime, unconnected with Mau Mau or any political aims, was on the increase in the post-war era, and that much of the violence attributed to Mau Mau may have been in fact non-political in nature; it has further been pointed out that the White settlers in Kenya have been pressing for home rule for many years, and that the elections to the Kenya Legislature in the previous June were largely taken up with the question of the increase in violence and the necessity for the transfer of power to deal with it from Whitehall to Nairobi. From these facts some people have deduced that the operation 'Jock Scott' and the declaration of emergency were inspired by the settlers' desire to demonstrate the necessity for a transfer of power to them, and that the subsequent widespread violence was the result of, not the reason for, the declaration of emergency and ensuing measures.[5] This is, of course, a conjecture as to motive and consequences which is impossible either to prove or disprove. Whether the operation 'Jock Scott' caused the growth of organised gang violence or whether it averted an even worse disaster is impossible to judge.

What is clear, however, is that the arrest of the alleged leaders of Mau Mau did not cause the collapse of the movement which was apparently expected[6]: far from it, the violence has

Who Killed Kenya? (1953) the reviewer states: 'He speaks of the Mau Mau society. There is still no evidence of such a society, still no evidence of any unifying force behind it other than the oath. The separate bands who now operate under the name certainly have no high command or even much contact with each other. To describe the whole movement as the work of a society is thoroughly misleading'.

[5] See, for example, the speech by Lord Strabolgi in *Hansard* (House of Lords), Vol. 178, col. 1117. See also the articles and speeches referred to by C. T. Stoneham in *Mau Mau* (1953), pp. 46–48.

[6] See *Hansard,* Vol. 505, cols. 865–866, where the Colonial Secretary said 'The declaration of emergency has enabled the Kenya Government to detain the ringleaders and their lieutenants, about 130 altogether. The prisoners will then be screened and some may be released when the tension following the operation relaxes'.

increased far beyond what could have been anticipated at the time. Why has this happened? There are some who maintain that the widespread violence is due simply to a desire for power on the part of a few leaders; and to a fear of those leaders, a hope of gain, and a sense of loyalty to individuals on the part of their followers.[7] This may well be part of the explanation, but it is clear also that the African population do harbour long-standing grievances, and Mr. Lyttelton himself, whilst maintaining that Mau Mau is not the direct result of economic pressure, has agreed that it would have been impossible for Mau Mau to 'have gained such momentum unless it could have fed the fires of its campaign . . . with the fuel of some supposed, some feigned and some genuine grievances'.[8] It is those grievances which I want first of all to consider. But before considering them individually, I should like to point out that they are all long-standing—they have not suddenly arisen with the advent of the present United Kingdom Government.[9] And as a general comment, I would suggest that the basic assumption that some of the grievances, at any rate, are 'supposed or feigned' is unfortunate —even if it does not, in fact, prevent an impartial investigation of them, it may well give the impression of so doing—and even the suspicion of bias should surely be avoided in the situation prevailing in Kenya today.

THE PROBLEMS OF KENYA

Space prevents more than a brief consideration here of a few of the major grievances of the Kenyan African, particularly in view of the involved and disputable nature of many of them.

Land Shortage. Perhaps the principal grievance of the African in Kenya is the land shortage and the disproportion between African land and European land. The tribe mainly

[7] See, for example, *West Africa,* August 22, 1953, p. 779, where this view is expressed in a letter. For similar views, see C. T. Stoneham, *Mau Mau* (1953).

[8] *Hansard,* Vol. 509, col. 1228.

[9] The long history of discontent in Kenya is shown by the large number of Commissions, White Papers, and books published on Kenya in pre-war days. See, for example, the list of pre-war official publications referred to by Lord Lugard in his introduction (pp. 7–13) to *Race and Politics in Kenya* (1944), a correspondence between Elspeth Huxley and Margery Perham.

affected has been the Kikuyu[10] tribe, the largest in Kenya,[11] which is centred largely around the area of European settlement, the White Highlands round Nairobi, with which the dispute is concerned. And it is significant that it is the Kikuyu people who are principally involved in the present violence. In considering this problem there are two separate questions which have to be examined: First, the question of law—whether the White Highlands legally belong to Africans, whether they were illegally taken from them; and, secondly, the question of justice and expediency, whether the White Highlands, or part of them, ought in justice and expediency to be made available to the African.

So far as the first question is concerned, the legal title of the Europeans to the White Highlands, there seems no doubt that the law supports the settler in his occupation. Settlement in Kenya in the years following the construction of the Kenya railway in 1901 was based upon the acceptance by the British Government in 1898 of the view, propounded by its legal advisers, that the declaration of the East African Protectorate in 1895 had given it sovereign rights over all land, subject to the recognition of any existing private rights.[12] This was interpreted as giving the Crown the right to dispose of unoccupied land, and the dispute in Kenya has mainly centred round the question of whether or not the Highlands were in fact unoccupied. But, in the light of subsequent decisions, this seems to be immaterial as a matter of law. In the first place, in 1913 the Judicial Committee of the Privy Council held in the case of *Re Southern Rhodesia*[13] that such rights as the natives possessed in Southern Rhodesia were insufficiently precise to constitute private rights which the Crown had to recognise, and, that, therefore, the Native Reserves were the property of the Crown. The application of this principle to Native rights in Kenya has never been

[10] Although this is the usual European way of spelling the word, Jomo Kenyatta has pointed out in *Facing Mount Kenya* (1938), p. xv, that the country is correctly called Gikuyu, and a Gikuyu person is Mu-Gikuyu (plural) and A-Gikuyu (singular).

[11] According to the *Colonial Office Report on Kenya for 1952*, p. 11, the Kikuyu comprise approximately 20 per cent of the African population of Kenya, that is, the total African population in Kenya of approximately five million includes one million Kikuyus.

[12] See Lord Hailey, *An African Survey* (1938), p. 742.

[13] [1919] A.C. 211.

tested, but, even if it were not to apply,[14] Crown rights over land would seem to be amply protected by other principles propounded by the Courts from time to time. Thus, *Ol Le Njogo* v. *Att.-Gen.*[15] indicates that the Crown is not bound by any treaties which it may have made concerning land in Kenya prior to 1920. In that case the East African Court of Appeal had to consider the validity of an agreement made between the Crown and the Masai tribe. A treaty had been made with the Masai tribe in 1904 guaranteeing their right to remain on the Lnikipia Plateau 'so long as the Masai as a race shall exist'. In 1911 a fresh agreement was made removing them from that territory. A section of the tribe brought an action alleging that this latter agreement was improperly obtained. The East African Court of Appeal held that they had no jurisdiction over a treaty made between the Crown and foreign subjects and that the Masai as protected persons were foreign, not British, subjects.[16] Kenya, except for the coastal belt, has, of course, since become a colony by virtue of the Kenya Annexation Order in Council, 1920, so that this principle would not apply to an agreement made in Kenya since 1920, except in relation to the coastal belt. That the principle should exist at all seems quite inconsistent with any idea of justice, in view of the fact that the protectorate, unlike the foreign State, cannot seek the protection of an international court, and is, therefore, totally unprotected if the municipal courts decline jurisdiction. Irrespective of the question of whether native rights constitute private rights, binding the Crown, and whether agreements made before 1920 bind the Crown, Crown occupation of the Highlands prior to 1920 seems to be fully protected by the provisions of the Foreign Jurisdiction Act, 1890, which give the Crown wide power to legislate by Order in Council in relation to protectorates. The ample nature of this power is illustrated by *Gathomo* v. *Indangara*.[17] In this case a dispute arose between parties in the Kikuyu tribe, one of whom claimed to hold land in individual tenure, by purchase from another tribe. The Court held that all private rights had, in

[14] This would presumably depend upon the Court's view of the nature of the system of land rights amongst the Kikuyu. For the Kikuyu system of land tenure, see Kenyatta, *op. cit.*, pp. 20–40.

[15] [1913] East African Law Reports, Vol. 5, p. 70.

[16] For an account of this incident, see Negley Farson, *Last Chance in Africa* (1949), pp. 155–156.

[17] [1920] East African Law Reports, p. 129.

fact, been vested in the Crown by the Crown Lands Ordinance, 1915, which had declared that Crown lands were to include 'all lands reserved for the use of any Native tribe'. The position of the African in the Reserves was described as being that of a tenant at will of the Crown! This incorporation of the Native Reserves in the definition of Crown lands has since been reversed by Ordinance, and the African given greater security of tenure in the Reserves.[18] Nevertheless, the decision does illustrate the wide powers available to the Crown to acquire land in Kenya prior to 1920; and, although Kenya is no longer a protectorate (except for the coastal belt), similar wide powers of legislation are still enjoyed in relation to the Colony by virtue of the British Settlements Act, 1887.

That the law supports the European occupation of the Highlands is clearly beyond doubt, and the extent of the White Highlands is now defined by Order in Council,[19] the legality of which cannot be disputed. But what about the justice and expediency of the matter? On this question there is no doubt that the African is grossly overcrowded in the Reserve, that there is some room for expansion in the Highlands, and that he does believe that much of the land was in fact at one time occupied by him.[20] To these claims, the answers generally given are: (1) that on the question whether land was taken from the African, the Carter Land Commission of 1933[21] exhaustively examined and adjudicated all claims and settled all that were judged valid by compensation in land or money; (2) that the White Highlands could only postpone the problem—there is not enough land for every man to be a land owner; and (3) that in any case the African would destroy the land by his primitive agricultural methods.[22] The following facts seem relevant to these answers. As to (1) it is true that the Carter Commission

[18] By amendments to the Crown Lands Ordinance, 1915.
[19] The Kenya (Highlands) Order in Council, 1939.
[20] For a Kikuyu's views on the European occupation of the Highlands, see Kenyatta, *op. cit.*, pp. 41–52.
[21] *Report of the Kenya Land Commission,* Cmd. 4556, 1934.
[22] The most recent expression of these three views is by the late Governor of Kenya, Sir Phillip Mitchell, p. 6 of Colonial No. 290 of 1952, *Land and Population in East Africa,* Exchange of Correspondence between the Secretary of State for the Colonies and the Government of Kenya on the Appointment of the Royal Commission. But these views have been earlier expressed, for example, by Elspeth Huxley in *Race and Politics in Kenya, op. cit.*

did exhaustively consider all claims and, in the absence of written records, or the pursuit of a similar inquiry, their Report must be accepted as conclusive. But it has been pointed out by some investigators[23] that the land was unoccupied partly because of a recent epidemic and famine, and partly because of the shifting methods of cultivation adopted by the Kikuyu; that, but for the European occupation, it would have been available for future expansion by the Kikuyu, subject to neighbouring tribes permitting it; and that the Commission, in the light of the present situation, obviously did not make adequate provision for the future land needs of Africans—it clearly felt itself precluded from making any recommendation which would involve a material reduction in the area which Europeans had desired to be reserved.

With regard to (2), the view that the White Highlands would only bring temporary relief, it might perhaps be said that in view of the urgent nature of the problems of congestion and the time which will necessarily be needed for the establishment of other forms of employment, even temporary relief would be sufficient justification for admitting Africans to the Highlands. Finally, as to (3), the question of the agricultural methods of the Africans in Kenya, it is perhaps worth noting that writing in 1893 before any land disputes between European and Kikuyu were in issue, Lord Lugard formed the opinion that 'the cultivation in Kikuyu is prodigiously extensive; indeed, the whole country may be said to be under tillage. . . . They have, moreover, a very well contrived system of irrigation'.[24] If this was in fact so in 1893, it would seem to be a sad reflection on our administration that the Kikuyu have advanced so little since then that in 1952 the Governor of Kenya considered that 'The land must on no account be simply thrown open for congestion and destruction by ignorant peasants following their ancestral agricultural practices and tenure'.[25]

In conclusion, it may be pointed out that even if the Africans' agricultural methods improve, the Highlands are still closed to them. They can neither obtain a grant of land in the

[23] See, for example, *Race and Politics in Kenya, op. cit.*, pp. 42–51; and Hailey, *op. cit.*, pp. 750–751.
[24] F. D. Lugard, *The Rise of our East African Empire* (1893), Vol. 1, p. 328.
[25] Colonial No. 290 of 1952, *Land and Population in East Africa*, p. 4.

White Highlands from the Crown nor buy any such land from an existing grantee of the Crown. With regard to grants by the Crown, the Colonial Secretary stated as recently as January 21, 1953, and reaffirmed on July 21, 1953, that: 'Land in the Highlands is granted by the Governor on the recommendation of the Highlands Board (which he is bound to consult). This Board is composed of the Chief Secretary as President, the Commissioner of Lands as Vice-President, four persons, who are not civil servants, appointed by a majority of European elected members of the Legislative Council present and voting at a meeting specially called for the purpose, and one person nominated by the Governor. . . . In practice land is granted only to Europeans'.[26] With regard to transfers of land to non-Europeans by existing lessees of the land, section 36 of the Crown Lands Ordinance, 1915, provides that 'There shall by virtue of this Ordinance be implied in every lease granted under this Part to a European a covenant that he shall not without the consent of the Governor in Council appoint or allow a non-European to be manager or otherwise to occupy or be in control of the land leased'.[26a] There would seem to be a strong case, at any rate, for permitting the African to buy land in his own country, whatever the arguments for or against the justice and expediency of expropriation may be. And on the question of expropriation, whether the grievance of the African be real or not, it may be said that some concession would be a gesture carrying immense political goodwill. Even if a grievance is only fancied, it is sometimes worth remedying it if this can be done without too much cost. One might perhaps appropriately apply to the Kenya land question the words used by Bagehot in 1872 in relation to the class question in England, when he wrote: 'They must avoid not only every evil, but every appearance of evil; while they still have the power, they must remove, not only every actual grievance, but where it is possible, every seeming grievance too . . . a losing battle—especially a long and well fought one would have thoroughly taught the lower orders to combine, and

[26] *Hansard,* Vol. 510, p. 34, and Vol. 518, p. 34. This requirement of consultation is imposed by section 5 (*c*) of the Kenya (Highlands) Order in Council, 1939; but there is no legal provision requiring the Governor to accept the advice of the Highlands Board.

[26a] See also section 88 of the Crown Lands Ordinance, 1915—No sale, *etc.,* of land in the Highlands without the consent of the Governor.

would have left the higher orders face to face with an irritated, organised and superior voting power'.[27] Whether the land grievance be real or not, the African thinks it is real and that in itself creates a problem for solution.

A Royal Commission on Land and Population in East Africa has been recently appointed so that the problem is now receiving some attention, but the terms of reference of the Commission, although wide, seem to exclude any consideration of the question of admitting non-Europeans to the European Highlands. They are to consider the development of better farming methods, the development of industrial activities, conditions of employment, and related fields such as public health and education; but they are directed to 'take account of existing obligations incurred by treaty, agreement or formal declaration of policy in relation to the security of land reserved for the different races and groups in various parts of the Territories concerned'.[28] This direction is, I think, unfortunate.

UNEQUAL TREATMENT

So much for the land grievance. I have dealt with the problem at some length because it has quite clearly constituted one of the principal causes of discontent in Kenya for many years. But there are, of course, many other long-standing grievances—wage rates, education, housing, political rights, inequality before the law courts, the colour bar.[28a] Clearly all these cannot be considered adequately in this paper, so I shall content myself with a consideration of a few of those grievances which are enforced by discriminatory legislation.

INEQUALITY BEFORE THE COURTS

One of these grievances is the unequal treatment accorded before the Courts. Justice is often said to be blind, but in Kenya at any rate it is not colour blind. First of all, there is a difference with regard to the right to trial by jury. It is only in the case of trials before the Supreme Court that the question of trial by jury arises, in other cases a magistrate alone tries the case. So far as

[27] Bagehot, *British Constitution,* pp. xxiii–xxiv.
[28] Colonial No. 290 of 1952, *Land and Population in East Africa,* p. 33.
[28a] See the Report of the Parliamentary Delegation to Kenya. Cmd. 9081 of 1954.

the European[29] is concerned, section 218 of the Penal Code provides that if the offence is punishable with more than six months imprisonment, he shall be tried before the Supreme Court by a jury which, under section 222, consists of Europeans only. So far as the non-European is concerned, only in the case of crimes for which the penalty is death or life imprisonment, has he a right to trial before the Supreme Court at all,[30] but even then there is no jury; the Court is simply assisted by three African assessors whose opinions can be disregarded if the Court thinks fit.[31] Whether this apparent inequality of treatment with regard to jury trial is justifiable is debatable. Those who support the present inequality of treatment state that the African assessor is prone to declare his belief in innocence even where guilt is obvious[32]; and, certainly, it must be admitted that in Mau Mau murder cases trial by African jury would possibly be impracticable.[33] But at the same time it is disturbing to find this argument coupled with the statement that 'a simple question to any common Native as to whether he would like to be tried by his peers, provokes consternation—he knows all too well what justice he would get, and give'.[34] The only logical deduction from the coupling together of these two reasons for non-jury trial is that the African dislikes being found not guilty.

Whatever the argument for and against jury trial for Africans, there is a further inequality before the law courts which may cause considerable hardship and which seems to me impossible to justify. I refer to the general absence of preliminary inquiry in the case of Africans accused of crime. Whenever a case is tried before the Supreme Court there is a preliminary inquiry,[35] but in the case of trial before a magistrate there is no such preliminary inquiry. Now, as I have said, Europeans are entitled to trial before the Supreme Court generally wherever the crime is punishable with more than six

[29] Section 2 of the Criminal Procedure Code provides that European means a person of European origin or descent and includes an American who is not of origin or descent other than European.
[30] See the Schedule to the Criminal Procedure Code.
[31] Sections 258, 259 and 318 (2) of the Criminal Procedure Code.
[32] See C. T. Stoneham, *Mau Mau* (1953), p. 29.
[33] The attempted intimidation of African assessors in Mau Mau cases has been reported from time to time; see, for example, *The Times* newspaper, September 29, 1953.
[34] Stoneham, *op. cit.*, p. 30.
[35] Section 227 of the Criminal Procedure Code.

months imprisonment. Africans, on the other hand, are not entitled to trial before the Supreme Court except in the case of offences punishable with death or life imprisonment. In other cases the African is ordinarily triable before a subordinate court, although the Supreme Court has, of course, jurisdiction to deal with other cases if it so wishes.[36] It is obvious that the preliminary inquiry does serve a useful purpose—it gives the accused knowledge of the evidence to be brought, and of the witnesses to be called against him, and so facilitates the proper conduct of his case.[37] The absence of such a safeguard may cause some hardship. Where the possible penalty is small, this hardship may perhaps be justified by the necessity for speed and the multiplicity of cases. Where the case is an important one and may involve a long term of imprisonment, as in the case of *R.* v. *Jomo Kenyatta and others,*[38] no such justification seems possible.

It is significant that when, during the emergency, regulations were made abolishing the preliminary inquiry even in the case of trials before the Supreme Court, in order to speed up the legal process, it was specifically provided that a list of prosecution witnesses, and a summary of the evidence of each, should be presented to the accused at least seven days before the trial.[39] No such safeguard exists, however, in the case of summary trial, and summary trial is the normal rule for Africans in the case of all offences, except those punishable with death and life imprisonment, even in times of peace.

In the case of *R.* v. *Jomo Kenyatta and others,* the accused would, if they had been Europeans, have had the benefit of a preliminary inquiry and trial before the Supreme Court. As it was, they were tried without any preliminary inquiry at the Resident Magistrate's court at Kapenguria. This case has not yet been finally concluded on appeal, but nevertheless there are certain comments which can be made on the course of the case so far. The material facts are these: Jomo Kenyatta and the five co-defendants were first detained under emergency regulations in the 'Jock Scott' operation. Their continued detention

[36] Section 81 of the Criminal Procedure Code.
[37] Sections 229 and 240 of the Criminal Procedure Code provide for the taking of depositions at preliminary inquiries and for the delivery of copies to the accused.
[38] Criminal Case No. 1 of 1952 of the Resident Magistrate's Court at Kapenguria.
[39] Emergency (Criminal Trial) Regulations, 1952.

without trial would have been justified by emergency regulations, but the Kenya Government decided to put them on trial on specific charges. They were for this purpose moved to Kapenguria, and there on November 24 were charged before a Mr. Thacker with offences connected with the membership and management of Mau Mau under sections 70 and 71 of the Penal Code of Kenya. They were remanded until December 3, and, in the meantime, the defendants applied to the Supreme Court of Kenya under section 81 of the Criminal Procedure Code for an order that either the case should be transferred to some other court of equal or superior jurisdiction in Nairobi or some other convenient place in the Central Province, or else the accused should be committed for trial to the Supreme Court itself. The grounds of this application were that a fair trial could not be held before Mr. Thacker and that the place of trial, Kapenguria, would be to the general inconvenience of the parties and the witnesses. This application was refused on December 1, when the Supreme Court said they were satisfied that a fair trial could be held before Mr. R. S. Thacker and that the holding of the trial in the rather inaccessible district of Kapenguria, whilst certainly inconvenient, was necessary in the emergency situation prevailing. The Supreme Court acted on the principle that justice would be done in the magistrate's court at Kapenguria. But one may perhaps comment that in such a case as this it is just as important that justice should be manifestly seen to be done—that there should be no grounds, however unjustifiable, for even a suspicion of bias, if this can be avoided. The fact that Mr. R. S. Thacker was a retired judge, who was specially appointed as acting magistrate at Kapenguria on November 17, 1952, the day the accused were arrested, that this was the first case he dealt with —and he has dealt with no other cases since—and that he had previously expressed opinions on the trustworthiness of one of the defendants, were clearly factors which might subsequently lead to allegations of unfairness, and such a danger could, it would seem, so easily have been avoided by means of an order for transfer of the case under section 81 of the Criminal Procedure Code. It seems a pity that preliminary inquiry and committal for trial in the Supreme Court were not thought to be practicable or justifiable in this case.

The trial then commenced before the Acting Resident

Magistrate at Kapenguria on December 3, 1952, and judgment was delivered on April 8, 1953, when Jomo Kenyatta was found guilty of managing Mau Mau, and the others guilty of assisting in the management, and all were sentenced to seven years' hard labour; in addition all were found guilty of being members of Mau Mau and sentenced to three years' imprisonment on this count. An appeal was brought in the Supreme Court of Kenya [40] and allowed on the technical ground of lack of jurisdiction, but this was reversed in the Court of Appeal for East Africa, and leave to appeal against this reversal was subsequently refused to the defendants by the Judicial Committee of the Privy Council. The relevant facts on this point were these: The trial magistrate was appointed to act as Resident Magistrate in and for the colony under Article XVII of the letters patent of Kenya on November 17, 1952, and this was noted in the *Gazette* on November 19. In the *Gazette* of the same date there appeared a notice that the Governor, acting under section 7 of the Courts Ordinance, had assigned Mr. R. S. Thacker 'to the Northern Province to exercise jurisdiction in such Province'. During the appeal before the Supreme Court it came to light that Kapenguria, where the trial was held, was not in the Northern Province at all, but in the Rift Valley Province. It was admitted that the facts giving local jurisdiction arose in Kapenguria, and that unless Mr. Thacker had jurisdiction to act there he had no jurisdiction to try the case there or anywhere else. The Supreme Court came to the conclusion that mere appointment as a Resident Magistrate did not itself confer jurisdiction to act in any Province until an assignment under section 7 was made, that on the evidence Mr. Thacker was assigned to the Northern Province, and that he therefore had no jurisdiction to act at Kapenguria in the Rift Valley Province. They rejected the contention that the intention was to assign him to whatever province Kapenguria was situated in, and that the written notification of assignment to the Northern Province was merely an error of nomenclature. Since it was admitted that all concerned believed Kapenguria to be in the Northern Province at the time, no intention to assign to any other province could be imputed. The Court of Appeal for Eastern Africa reversed this finding [41]: they held that the provisions of

[40] Criminal Appeal Nos. 276, 277, 278, 279, 280 and 281 of 1953 of H.M. Supreme Court of Kenya sitting at Kitale.

[41] Criminal Appeal No. 228 of 1953 in H.M. Court of Appeal for Eastern Africa at Nairobi.

section 7 were directory not mandatory, and that, therefore, a substantial compliance with its provisions was sufficient. Mr. Thacker was in fact assigned to Kapenguria which, being in the Rift Valley Province, was a sufficiently substantial compliance with the requirement of assignment to the Rift Valley Province without specifying that Province by name. The assignment is not required by section 7 to be in writing and, therefore, it may be noted, the written notification of assignment to the Northern Province was not conclusive. The decisions of the Supreme Court of Kenya and the East African Court of Appeal seem to be distinguished largely by a different view of the facts rather than by a different view of the law. Both Courts held that an assignment to a Province was necessary, but whereas the Supreme Court held that the local magistrate was assigned to the Northern Province in which Kapenguria was believed to be situated, the East African Court of Appeal held that he was assigned to Kapenguria in whatever Province that was situated. It may be noted that whereas an appeal lies to the Supreme Court on a matter of fact or law, further appeal to the Eastern African Court of Appeal lies on a matter of law only, not on a matter of fact. It may then be questioned whether the Eastern African Court of Appeal were entitled to infer as a fact that the trial magistrate was assigned to Kapenguria. However, leave to appeal to the Judicial Committee of the Privy Council was refused later last year.[42] The defendant's appeal on the technical point of lack of territorial jurisdiction having then failed, the appeal proceeded before the Supreme Court on other grounds raised by the appellants. On January 15, the appeals of all but one of the defendants were rejected on the ground that there was evidence before the trial magistrate on which he could legitimately have come to the conclusion to which he did in fact come.[43]

A further appeal is now pending. Whatever views are taken of the correctness of the decision of the East African Court of Appeal, it may perhaps be a good thing that the appeal is being dealt with on the merits rather than on a narrow technical ground. It has often been said that the technicalities in the law in Kenya are unfortunate in that they are not understood by the

[42] *The Times* newspaper, October 21, 1953.
[43] *The Times* newspaper, January 16, 1954.

African.[44] I would suggest that there is no distinction in this respect between the Kenyan African and the 'man on the Clapham omnibus' anywhere else. Technicalities in the law should surely be avoided everywhere, so far as is possible. Escape on a technicality may be good law, but it can hardly be said to be good justice.

Finally, on this question of inequality before the law courts, which is illustrated by the *Kenyatta Case,* equal rights do not, of course, necessarily mean identical laws. Whilst all races should receive equal treatment from the law in respect of benefits and responsibilities, it may be said that the laws should at the same time give effect to the social consciousness of the people to whom they apply and be understood by the people to whom they apply if they are to fulfil their purpose; and different laws may consequently be required for different races. In fact, it may well be a grievance if the same laws are applied to all races irrespective of their social and economic situation.[45]

POLITICAL RIGHTS

Now as to the question of political rights. Political representation, or rather the lack of it, forms, with the land question and inequality before the law courts, one of the major grievances of the African, or at any rate the educated African, in Kenya and, of course, of the Indian as well, as all these grievances affect the whole non-European population. Under the existing Constitution[46] the Legislative Council consists of the Governor, who is the President, a Vice-President who is the Speaker, and fifty-four other members. Of the fifty-four, eight are *ex officio* members, eighteen nominated, fourteen elected European members, six elected Asian members, one an elected Arab member, six nominated Africans, and one a nominated Arab. The European population of approximately 30,000 has, accordingly, fourteen elected representatives, the Indian population of approximately 100,000 has six elected representatives, and the African popula-

[44] See, for example, *The Times* newspaper, August 29, 1953, where a woman delegate at the European Electors' Union Conference was reported as having said that 'it did not make sense to an African when a criminal was acquitted on technical grounds'.

[45] See *The Times* newspaper, August 29, 1953, for a report of the expression of similar views by delegates to the European Electors' Union. See also Clifton Roberts, *Tangled Justice* (1937).

[46] See *Colonial Report on Kenya for 1952,* p. 139.

tion of approximately five million has no elected members at all, but is represented only by six Africans nominated by the Governor. The Executive Council consists of eight official members and four unofficial members, of whom two are Europeans, one an Indian and one an African member, chosen from the Legislative Council.[46a] There is thus the curious position of persons who may be opposed to the Government in the Legislature sitting in the Executive Council.

It is quite clear that the Africans are grossly under-represented in the Government of Kenya. But that is not their major grievance; the real grievance is that African representation is so disproportionate compared with that of the European settler. The history of political rights in Kenya is not so much a story of pressure from the African for representation, as a story of pressure from the European settlers for government by them instead of from Whitehall. Throughout, the United Kingdom have taken the view that since the interests of the African population and the immigrant European population might well be in conflict, power to govern could not be delegated entirely to the European settlers. Thus, in 1923 the Devonshire White Paper stated that 'In the administration of Kenya His Majesty's Government regard themselves as exercising a trust on behalf of the African population, and they are unable to delegate or share this trust, the object of which may be defined as the protection and advancement of the native races'.[47] But none the less, the influence of the European settlers on Government, has been considerable. The United Kingdom Government, whilst retaining ultimate responsibility for African interests, has in fact given the Europeans a large share in the government of the territory. And as Lord Hailey pointed out in 1938, 'It has been the practice in Kenya to consult unofficial opinion much more than a narrow interpretation of the Constitution would require'.[48] Their influence is well illustrated by the effect of their opposition to the Indian vote in the nineteen twenties. In 1919 elected Europeans had taken their place in the Legislative

[46a] Since the reading of this paper, the Colonial Secretary has suggested some amendments to the Kenya Constitution designed to increase the representation of all races in Kenya at the Executive level; it would appear that these suggestions, which were reported in *The Times* on March 11, 1954, are likely to be put into effect.

[47] *Indians in Kenya,* Cmd. 1922 of 1923.

[48] Hailey, *op. cit.,* p. 166.

Council for the first time. This led to a demand from the Indian immigrants for an equal privilege on a common role. The British Government devised a plan for a common electoral roll for Europeans and Indians. However, the Europeans 'threatened armed resistance',[49] and, apparently, had a plan devised for the capture of the Governor and the seizure of the postal and telegraph systems.[50] This led, not, as one might have expected, to the suspension of the Constitution or the deportation of the leader of the settlers, but to the British Government abandoning their plan for a common roll. Instead a compromise was adopted and provision made for five Indians to be elected on a communal role.

The political future of Kenya is far from clear. It is inevitable that the African population will obtain a greater representative share in government sooner or later, and, as a matter of expediency, there seem to be strong arguments for giving it at an early date. Political representation does give the hope of removal of alleged grievances by constitutional means, and thus constitutes a valuable political safety valve. The ultimate degree and form of representation for each race so as to secure equal consideration is the difficult question for the future of Kenya. Here are many familiar alternatives.[51] The most desirable situation is clearly a common roll without regard to race, but this depends upon a mutual faith and trust which may not be easy to achieve, particularly after the present emergency.[52]

EMERGENCY POWERS

To secure a settlement of the grievances of the African population that will be acceptable to the European immigrants,

[49] See *Colonial Report on Kenya for 1952*, p. 135, and Hailey, *op. cit.*, pp. 164–165.

[50] See Negley Farson, *Behind God's Back* (1940), pp. 234–236, and also by the same author, *Last Chance in Africa* (1952), p. 30.

[51] Of the alternatives, communal representation, federation, partition, and so on, one, namely, partition, has now been expressly rejected by the European Elected Members' Organisation of Kenya, see next footnote.

[52] A recent policy statement of the European Elected Members' Organisation of Kenya, reported in the *East African Standard*, November 13, 1953, indicates that the settlers are now willing to concede that a greater share in the government of the country must be accorded to non-Europeans, and that self-government and partition are impracticable. However, the statement, on the other hand, maintains that the existing policy with regard to the White Highlands must continue, and calls for a vigorous white immigration policy with strict control on immigration from the East—a view which is hardly likely to lead to better race relations.

the Asian immigrants, and the African population is obviously not going to be easy, but it is none the less essential if Kenya is to contain a peaceful multi-racial community. Equally essential is the quelling of the present violence, without causing unnecessary resentment amongst the law-abiding members of the African population. If the emergency is conducted in such a way as to alienate law-abiding Africans, or in such a way as to make it appear as a struggle between White and Black, the solution of the problems of Kenya will clearly be made even more difficult. And on this ground the conduct of operations has from time to time occasioned criticism.[52a] As was stated in *Liversedge* v. *Anderson*,[53] a war cannot be fought on the principles of Magna Carta, but if justice does sometimes have to give way to necessity in war, at least the necessity must be shown to be a real one. Quite apart from the abuses of the use of force which have come to light from time to time,[54] there are some legal measures which are open to question. Amongst these mention must be made of collective punishment[55] and retrospective punishment.[56] So far as the former is concerned, it infringes the basic principle of English law that it is better for one hundred guilty men to go unpunished than for one innocent man to suffer, and can only be justified by evidence of absolute necessity in each particular case. Even if it is proved to be necessary, it is clearly a remedy that needs to be applied with care. It has such obvious potentialities for alienating the sympathies of those whose co-operation is essential. The provision for retrospective punishment would seem to be even more difficult to justify on the grounds of necessity.

CONCLUSION

Whilst condemning the barbaric violence of Mau Mau adherents —which is well substantiated by both witnesses and documentary evidence—and realising the temptation to reply in like kind, it is necessary to recognise that even if law and order can be

[52a] See pp. 7–9 of the Report of the Parliamentary Delegation to Kenya. Cmd. 9081 of 1954.

[53] [1942] A.C. 206.

[54] For example, the case of Captain Griffiths.

[55] See Regulation 4A of the Emergency Regulations, 1952, and *The Times* newspaper, August 19, 1953.

[56] See *The Times* newspaper, October 21, 1953, for comment on the proposal to introduce a bill providing for retrospective confiscation of land.

restored, it certainly cannot be maintained, by force alone. A careful regard for law and order in the conduct of operations, and, even more, the recognition and remedying of grievances, wherever possible, are generally recognised as essential for a return to permanent law and order. Abuses of force can be checked and removal of grievances can be obtained, to some extent, by law, but law is not in itself sufficient unless there is a general desire to observe its letter and its spirit. A recent illustration of that is the latest Report of the Commissioner for Scheduled Castes and Tribes in India: Untouchability is forbidden under Article 17 of the Indian Constitution, but the Report shows that untouchability still persists; the untouchables were often too afraid to claim their new civic rights in the light of the attitude of the caste Hindus.[57]

Although the situation in Kenya presents a current legal problem, the troubles of Kenya can in fact be properly solved only by a genuine desire amongst the different races to live in peace and harmony.

[57] *The Times* newspaper, December 19, 1953.

THE STATUS OF THE INTERNATIONAL CIVIL SERVICE

L. C. Green

The International Civil Service consists of those persons who are employed on either a temporary or a permanent basis by international organisations and who, during that employment, are expected, regardless of national origin, to place the interests of the organisation employing them above all else. Their role as international civil servants poses not so much a problem of dual loyalty as of dual service, and there is no reason why national allegiance should clash with the duties of service to an international organisation.

The International Civil Service had its origins in 1856 with the establishment of the European Danube Commission.[1] By its constitution provision was made for the 'neutrality' of the members of the Commission, and this was to be respected even in time of war. Since then, the number of international organisations has vastly increased until today a real international outlook is required of the international civil servant, and this outlook may be defined as 'an awareness made instinctive by habit of the needs, emotions and prejudices of the peoples of differently circumstanced countries, as they are felt and expressed by the people concerned, accompanied by a capacity for weighing these frequently imponderable elements in a judicial manner before reaching any decision to which they are relevant'.[2] The matter may be expressed a little differently in the words of the Staff Regulations of the United Nations: 'Members of the Secretariat are international civil servants. Their responsibilities are not national but exclusively international. By accepting appointment they pledge themselves to discharge their functions and to regulate their conduct with the interests of the United Nations

[1] Treaty of Paris, 15 Martens, *Nouveau Receuil Général*, p. 770. See also advisory opinion of the World Court on the *Jurisdiction of the European Danube Commission* (1927), Series B/14, p. 6, at pp. 35, 42 and 63.

[2] Jenks, 'Some Problems of an International Civil Service' (1943) 3 *Public Administration Review*, p. 93 at p. 95. See also Scott, 'The World's Civil Service' (1954) *International Conciliation*, No. 496.

only in view. . . . The whole time of staff members shall be at the disposal of the Secretary-General'.[3]

As is implied by this Regulation, the existence of an International Civil Service involves consideration of three interconnected problems which are present whatever the international organisation concerned[4]: there is the relation between the organisation and the host State, the relation between the employees and the Secretary-General who is their nominal employer, and the relation between the staff and the host State and their national State. Considerations of space prevent an analysis of the position with regard to a variety of international organisations. Furthermore, since most of the organisations in existence are connected with or dependent upon the United Nations and make use of the same sort of staff regulations, it suffices to confine attention to the Secretariat of the United Nations. It should be borne in mind, however, that the United Nations is not, from this point of view at least, a novel creation and precedents are to be found in the experience of the League of Nations.

THE STATUS OF THE SECRETARIAT

The Covenant dealt with the status of the Secretariat shortly but directly. By Article 6 the Secretariat under the Secretary-General was placed under the authority of the Council, although later this was transferred to the Assembly. Article 7 provided that the representatives of members and League officials 'when engaged on business of the League shall enjoy diplomatic privileges and immunities'. This provision first appeared in the Hurst draft, and of it Sir Cecil Hurst has said that it was intended to place these persons 'in a position of non-subjection to the local jurisdiction. . . . It was proposed and was accepted as a right and proper principle which should apply'.[5] Although entitled to diplomatic immunities, such officials are in a privileged position when compared with diplomats, for protection is awarded against the official's national government as well, a point which was reiterated by the World Court in its advisory opinion on *Reparation for Injuries Suffered in the Service of the United*

[3] Reg. 1, UN Doc., ST/AFS/SGB/94, 1953.
[4] See, for example, the writer's 'Legal Aspects of the Schuman Plan' (1952) 5 *Current Legal Problems*, p. 274.
[5] Hurst, *International Law: Collected Papers* (1950), p. 120.

Nations (1949).[6] In this opinion, the Court also stressed that, regardless of the immunities enjoyed, the United Nations was still not a State. This point had already been made in connection with the League of Nations when it was emphasised that although the League was not a State it possessed, 'in regard to the officials with whom it contracts, what are in effect sovereign powers',[7] so that its contracts with officials were public law contracts not subject to the ordinary rules of private law, and liable to unilateral amendment.[8]

In the days of the League the problem was only important for Switzerland—and where the World Court was concerned The Netherlands—and was regulated by a *modus vivendi* between the League and Switzerland, although some countries, for example the United Kingdom, exempted all officials including their own nationals from income tax liabilities.[9] With the United Nations, however, the problem is far more complex. The scope of the organisation's activity is wider and its staff larger, while the United Nations or its organs, committees and adjuncts operate in the territory of nearly every Member and in some cases in the territory of non-members too. The status of the Secretariat is regulated not only by the Charter, but by a number of additional documents as well.

Article 97 of the Charter defines the Secretariat and Article 100 seeks to establish the complete independence of the staff. The problem of staff integrity is twofold. On the one hand, they are forbidden from seeking or receiving instructions from any authority outside the organisation, and are to 'refrain from any activity which might reflect on their position as international officials responsible only to the organisation'. The significance of this proviso was made clear in *U.S.* v. *Coplon* (1949). Rifkind, D.J., pointed out that immunity only extends to 'United Nations officers and employees for the category of acts performed by them in their official capacity and falling within their functions as such officers or employees. . . . It seems clear that unlawful espionage is not a function of the defendant as an employee of the United Nations. Freedom from

[6] *I.C.J. Reports 1949*, p. 174, at p. 179.
[7] *Records of 20th and 21st Assemblies*, 1946, Annex 23, p. 245, at p. 262.
[8] *Ibid.*, but cf. *Records of 13th Assembly*, 1932, Special Supplement 107, pp. 206–208.
[9] Hill, *Immunities and Privileges of International Officials* (1947), p. 14.

arrest for such conduct is not a privilege or immunity necessary for the independent exercise of the defendant's function in connection with the United Nations'.[10] It might be pointed out here that these comments were made about a Soviet citizen on whose behalf it was contended that he was also a member of the Soviet Embassy. This plea was unsuccessful, but it is obviously incompatible with membership of the Secretariat to be a member of a national embassy. On the other hand, it is also provided that the Members are to recognise the international character of the Secretariat and not 'to seek to influence them in the discharge of their responsibilities'. This provision indicates the nature of any possible conflict as being one of *duties,* rather than *loyalties.* It should be compared with the overriding orders given to General MacArthur in his capacity as Supreme Commander for the Allied Powers.[11]

The Charter further provides in Article 101 that the Secretary-General appoints the staff in accordance with regulations established by the General Assembly, his chief consideration being the 'necessity of securing the highest standards of efficiency, competence and integrity', while at the same time paying due regard to equitable geographical distribution. This is more easily said than done, for the Headquarters are in New York and the United States provides more than one-third of the budget and about 2,000 members of the staff, of whom some 350 are in professional categories.[12] In view of these figures it is perhaps not surprising that at times the United States finds it somewhat irksome to comply with Article 105 which guarantees to the representatives of Members and the officials of the organisation 'such privileges and immunities as are necessary for the independent exercise of their functions in connection with the organisation'.

STAFF IMMUNITIES

By the *modus vivendi* of 1921[13] non-Swiss League personnel were assimilated to diplomats, and those in the 'First Category'

[10] 84 F. (Supp.) 472 at 474.
[11] See the writer's 'Law and Administration in Present-Day Japan' (1948) 1 *Current Legal Problems,* p. 188 at pp. 193–194.
[12] Friedmann, 'The United Nations and National Loyalties' (1952–1953) 8 *International Journal,* p. 17 at p. 19.
[13] Hill, *op. cit.,* Annex 1.

were given complete immunity, while those in the 'Second Category' would only 'enjoy complete immunity in respect of acts performed by them in their official capacity and within the limits of their duties'. At first Swiss nationals were given temporary privileges, but these were revoked in 1923. By the 1926 *modus*[14] the status of the Secretariat was placed on a permanent basis and certain privileges were extended to Swiss nationals when acting in their official capacity. In both documents it was recognised that the immunities were granted for the benefit of the League rather than its officials, and provision was made for waiver by the Secretary-General, it being clearly understood that the League would 'endeavour to facilitate the proper administration of justice and execution of police regulations at Geneva'.

In the case of the United Nations the problem was far more complex than with the League. Traditionally the United States would not extend immunity to international organisations. By American law immunities only attached to diplomatic representatives in the traditional sense of the term, although 'customs courtesies and free entry privileges are granted to League officials *en route* through the United States and measures for their protection are afforded if requested'.[15] As late as 1941 diplomatic immunity was denied to the Assistant Director of the Pan-American Union,[16] of which, unlike the League, the United States was a member. It was in line with this tradition, therefore, when the United States refused to accede to the 1946 Convention on Privileges and Immunities of the United Nations.[17] In the United States the situation is governed by the International Organisations Immunities Act, 1945,[18] and the Headquarters Agreement, 1947.[19]

The parties to the Convention recognise that the United Nations is immune from suit and its premises everywhere inviolable. These principles are embodied in the Headquarters Agreement but were applied in *Curran* v. *City of New York*

[14] Hill, *op. cit.*, Annex 2.
[15] Under-Secretary of State to Turkish Ambassador, 1933, 4 Hackworth, *Digest of International Law* (1942), pp. 422–423.
[16] *Ibid.*, p. 423.
[17] *Handbook on the Legal Status, Privileges and Immunities of the United Nations*, Doc. ST/LEG/2, September 2, 1952, p. 26.
[18] Public Law 291, 79th Congress, 59 Stat. 669; *ibid.*, p. 277.
[19] *Ibid.*, p. 57.

(1947)[20] even before the Agreement came into force. On the non-judicial level a similar issue had arisen between the Secretary-General and the Czechoslovak Government in May, 1949, when the latter apologised for attempting to arrest a Czech employee of the Secretariat in the actual building of the United Nations Information Centre at Prague.[21] Complete immunity is conferred by the Convention upon the representatives of Members in order to safeguard the independent exercise of their functions for the United Nations, 'consequently a Member not only has the right *but is under a duty to waive the immunity* of its representatives in any case where *in the opinion of the Member* the immunity would impede the course of justice'. The Soviet Union did not accede to the Convention until September, 1953, and, when Gubitchev was indicted with his co-accused in *U.S.* v. *Coplon,* tried hard to assert his immunity. A similar immunity is extended to the officials of the United Nations, but in their case the 'right and duty' of waiver is imposed upon the Secretary-General, and the immunity only extends to acts done in an official capacity. Thus, in the *Mudroch Case* the Secretary-General agreed to surrender this official when assured that he was wanted on 'suspicion of contacts with a group under trial for anti-State activities' and would not be questioned about United Nations activities or words spoken or written or acts performed in his official capacity. Similarly, in September, 1949, the same principles were applied to the Republic of Korea, a non-member of the United Nations. The Secretary-General acquiesced in the arrest of two Korean employees of the United Nations Commission on Korea when Korea acknowledged the overriding immunity of such officials, but pointed out that they were arrested for criminal conspiracy on matters having no possible connection with their United Nations duties, although they had undoubtedly used the umbrella of their employment to do this.[22]

The Headquarters Agreement imposes upon the United States more or less the same obligations as those with which it would have been burdened had it been a party to the Convention, with

[20] 191 Misc. 222; Green, *International Law Through the Cases* (1951), p. 897.
[21] *Mudroch Case,* Crosswell, *Protection of International Personnel Abroad* (1952), pp. 63–64.
[22] *Ibid.,* pp. 63–67.

additional obligations necessitated by its being the host State of the United Nations. The Agreement recognises the continued validity of United States law in the absence of provision to the contrary. When contrary provisions exist United Nations regulations prevail. The United Nations area is immune from legal and police process without the consent of the Secretary-General, and by 1953 the latter had permitted United States officials access to finger-print and question American employees.[23] At the same time the right of access and immunity is guaranteed to representatives of Members and officials of the United Nations and its specialised agencies, although in 1953 Mrs. Alvar Myrdal, director of the Social Science Department of UNESCO, was originally refused admission to attend a meeting of the Commission on the Status of Women.[24] Similar immunities are supposed to be extended to experts, the representatives of non-governmental organisations and others invited on official business. Further, the immunities exist regardless of the state of relations between the United States and the government of the person concerned, and, consequently, 'in case of abuse of such privileges of residence by any such person in activities in the United States outside his official capacity, it is understood that the privileges . . . shall not be construed to grant him exemption from the laws and regulations of the United States regarding the continued residence of aliens'. But before action can be taken there must be consent from the Secretary of State together with reasonable evidence as to status, which did not exist for Gubitchev in *U.S.* v. *Coplon.*

The basic premise on which the Agreement rests is that it should 'be construed in the light of its primary purpose to enable the United Nations at its headquarters in the United States fully and efficiently to discharge its responsibilities and fulfil its purposes'. In *Westchester County* v. *Ranollo* (1946)[25] it was held, therefore, that the Secretary-General's chauffeur was not covered for driving offences even though Mr. Lie was in the car at the time. On the other hand, in the same year, Mr. Page-Sharp, the Diplomatic Secretary of the Australian Delegation, was held to be immune from a speeding charge.[26] In the same way it is

[23] *The Times,* January 31, 1953.
[24] *Ibid.,* May 1, 2, 1953.
[25] 67 N.Y.S. 2d. 31.
[26] Crosswell, *op. cit.,* p. 84.

difficult to quarrel with the decision in *U.S.* v. *Keeney* (1953),[27] in which Holtzoff, D.J., pointed out that the Agreement 'cannot affect any activities on any matters that occur outside of' the protected area, and the question which had been put to the plaintiff by a Senate committee, and which she had declined to answer on grounds of privilege, 'does not call for the disclosure of any information known to the witness by reason of her official position. It relates to events that occurred prior to her securing that employment, and which in the nature of things would be known to her from sources outside of the United Nations. . . . The Court, therefore, reaches the conclusion that . . . the question here involved did not relate to privileged matter, and, therefore, the assertion of privilege was not well-founded'. It might well be asked how far a suspect official, of United States or alien nationality, could possibly assist 'the United Nations at its headquarters in the United States, fully and efficiently to discharge its responsibilities and fulfil its purposes'.

The last document to which reference need be made in this connection is the Immunities Act. Although this is not an international agreement it cannot be ignored. It is an enactment of the United States Congress and is binding upon the Government and the Courts, and there can be little doubt that its provisions must to a certain extent guide the Secretary of State in his relations with the Secretariat. By it the President is authorised to withhold, withdraw or limit the enjoyment by any international organisation or its officials or employees of any of the privileges, exemptions or immunities provided for in the Act. These are more or less identical with those embodied in the Headquarters Agreement, and they likewise extend only 'to acts performed in an official capacity and falling within their functions' unless they have been waived.

The Act recognises that the presence of an international organisation in the United States will mean the presence of aliens some of whom might be undesirable. Therefore, 'should the Secretary of State determine that the continued presence in the United States of any person entitled to the benefits of this [Act] is not desirable, he shall so inform the foreign government or international organisation concerned . . . and after such person shall have had a reasonable length of time . . . to depart from

[27] 111 F. (Supp.) 233 at 235–236.

the United States, he shall cease to be entitled to such benefits'. In the difference of approach indicated in these documents as existing between the United States and the United Nations lie the seeds of conflict between municipal law and international obligations which culminated in the situation of 1952–1953.

STAFF PROTECTION

When the League was first established there was no standard contract and all employment arrangements were worked out *ad hoc,* although the First Assembly in 1920 gave employees who had contracts for five years or more the right to appeal to the Council against decisions of the Secretary-General as head of the Secretariat. In 1925 an employee named Monod was dismissed before the expiration of his contract. The matter was referred to a Committee of Jurists who reported that such a contract was subject to 'public interest' and that 'the administration must always retain discretionary powers, as otherwise it could not ensure the development of these relations with due regard for the recognised public requirements for the satisfaction of which they were constituted. Relations connected with public employment necessarily presuppose the acceptance of these principles. . . . The same must *a fortiori* be true in the case of the League of Nations, which is called upon to satisfy requirements which are more complicated in that they are international, and which, in consequence, must exercise a still wider discretionary power in respect of the engagement, retention and dismissal of officials'.[28]

As a result of the *Monod Case* the League Assembly in 1928 established an Administrative Tribunal to hear appeals by members of the Secretariat against actions of the Secretary-General in connection with the Staff Regulations and the interpretation of contractual rights. In *Judgment No. 2* (1929) the Tribunal pointed out that it applies the 'internal law of the League of Nations and the stipulations agreed between the League of Nations and its officials', and while the Assembly retains the right to amend the Staff Regulations it must 'not infringe the acquired rights of any staff member'.[29] This interpretation was supported by the Committee of Jurists, which

[28] 6 *Official Journal,* 1925, Annex 790, p. 1441 at p. 1443.
[29] *Records of 13th Assembly,* 1932, Special Supplement 107, p. 207.

included Judge Basdevant, Professor Max Huber and Sir William Malkin, appointed in 1935 to consider the power of the Assembly to reduce salaries. The Jurists pointed out that League officials were in 'international public service. The legal relationship which exists between them and the Secretariat . . . is not a legal relationship of private law. . . . [The Assembly would not, however, have the right to reduce salaries unless it was reserved in the contract.] If the Assembly reduced the salaries of officials, the latter would have the right to have recourse to the Administrative Tribunal. . . . The Committee think that the Tribunal would decide in favour of the officials. As a result of such a decision . . . the Assembly would then require to make in the next budget provision for paying compensation'.[30]

That the Tribunal would so decide was demonstrated in 1946 when thirteen judgments were delivered supporting members of the staff who in 1939 had refused to accept amendments, based on redundancy of staff resulting from the outbreak of war in 1939, to their contractual rights of notice. Thus, in the *Meyras Case*[31] it was held that acquired rights must be respected, that the Staff Regulations in force at the date of the contract remained applicable, and that *force majeure* did not justify the actions of the Secretary-General. The Assembly, however, took a different point of view. A Sub-Committee of the Assembly's Finance Committee under the chairmanship of Sir Hartley Shawcross contended that the applicants had really forfeited any right to call themselves public officials as they had refused to accept the principles essential for public service with the League after the war. Sir Hartley compared them with Crown servants who are unable to sue for wrongful dismissal and the like. This is in accordance with the decision of Tucker, J., in *Rodwell* v. *Thomas*,[32] but there are *obiter* by Denning, J., in *Robertson* v. *Minister of Pensions*[33] and by Lord Goddard in *Terrell* v. *Colonial Secretary*[34] which suggest that there is a trend in the opposite direction.

The Sub-Committee upheld the competence of the Administrative Tribunal, but considered it as subject to the overriding

[30] *Ibid.*, pp. 206–208.
[31] *Loc. cit.*, note 7 above, p. 247.
[32] [1944] K.B. 596 at 602.
[33] [1948] 2 All E.R. 767 at 770.
[34] [1953] 2 All E.R. 490 at 497.

powers of the Assembly: 'The League does possess in regard to the officials with whom it contracts, what are in effect sovereign powers. . . . It seems to us impossible to suppose that, in no circumstances, however pressing the necessity in the interests of the peoples of the world, could the League derogate from some contract to a private individual employed by it. On the contrary, we think it necessary for the proper discharge of the functions of a world organisation of States, that it should possess a power if necessary to set aside the vested rights of private individuals employed in its administration. Only an excessively static legal view would justify the conclusion that the League was fettered in its own administrative organisation by the rules of the private law of contract applicable to the employees of a trading or commercial undertaking. Relations connected with public employment in the service of the League necessarily presuppose the acceptance of these principles'.[35] The Sub-Committee went on to indicate that no body other than the Assembly could enforce the Tribunal's awards, and that it could just as easily abolish the Tribunal. The fact that it did not do so in no way altered the situation: 'By statutory provision and diplomatic usage no remedy is available against the League; where, then, is the officials' right against it? *Ubi jus ibi remedium,* and the absence of any remedy in the circumstances of this case leads to the conclusion that there is no legal right. . . . We conclude that it was not open to the Administrative Tribunal to question the validity of the Assembly's Resolution. . . . Its only duty was to give effect to it. . . . Although there is no ordinary appeal from the Tribunal's decision, we think that it is within the power of the Assembly, which can best interpret its own decisions, by a legislative resolution, to declare that the awards made by the Tribunal are invalid and of no effect'.[36]

The Finance Committee of the Assembly adopted the Report and the awards were not paid. The Report and the decision taken thereon are of extreme importance in considering the position of awards made by the United Nations Administrative Tribunal and the power of the General Assembly to disregard them.

Even before the Final Session of the Assembly struck the

[35] *Loc. cit.*, note 7 above, p. 262.
[36] *Ibid.*, p. 263.

death knell of the League's Administrative Tribunal and showed the hollow character of its awards, Judge Hudson summed it up as follows: 'It gave twenty-one judgments. . . . As affirmative relief was given in only eight cases, the jurisprudence did not establish an extensive body of case-law'.[37] It would be as well, therefore, in looking at the position of the International Civil Service today and at the operations of the United Nations Administrative Tribunal, to regard the latter as a virtually new creation, and not to seek guidance from the activities of the League Tribunal. One must, however, bear in mind the general comments, made on the nature of the contracts, especially those by Committees of Jurists, and particularly the emphasis laid on the sovereign nature of the organisation in relation to its administrative staff.

The United Nations staff is controlled by Staff Regulations which expressly assert their international status and pledge their exclusive service to the United Nations. The Regulations lay down salaries at rates prescribed by General Assembly Resolution 239 (III), but subject 'to such changes as may be directed from time to time by the General Assembly'. This represents in express terms the idea underlying the 1946 Report proclaiming the League Assembly's 'sovereignty' in this field, and is of great significance when examining the finality or binding character of awards by the United Nations Administrative Tribunal.

The Regulations also provide for a Joint Advisory Committee representing the staff and the Secretary-General to advise the latter on personnel policy, while they permit the latter to terminate employment in accordance with the letter of employment or if the necessities of the service require the abolition of a post or the reduction of staff. Secretary-General Hammarskjöld was able to make use of this provision in connection with his reorganisation of the Secretariat and abolition of the assistant secretaries-general.[38] The services of permanent members of the staff may also be terminated if they prove unsatisfactory—a term which would almost certainly cover an official who had lost the confidence of the country in which he was stationed and perhaps one who was no longer trusted by his own country—while

[37] *International Tribunals* (1944), p. 221.
[38] Doc. A/2554, November 12, 1953; and for the Assembly's approval, *The Times*, December 10, 1953.

temporary staff may be dismissed if 'such action is in the interests of the United Nations'. Although the Regulations refer to notice and the payment of indemnities, no indemnity is payable to one who has been 'summarily dismissed'. A Joint Disciplinary Committee exists to advise on disciplinary matters, although the Secretary-General is authorised to impose disciplinary measures on employees whose conduct is unsatisfactory and may summarily dismiss them for 'serious misconduct'. From what has occured since 1953, and particularly in the light of the Opinion of the Commission of Jurists[39] considered below, it would appear to be 'serious misconduct' for United States personnel on the staff to take advantage of the Fifth Amendment before Congressional inquiries. Employees may appeal to the Joint Appeals Board and to the Administrative Tribunal which has been established to hear and adjudge allegations of non-observance of terms of employment. By its Statute[40] the Tribunal may order the contested decision to be rescinded or the obligation invoked to be specifically performed, but if the Secretary-General considers this impossible or inadvisable compensation 'shall be fixed by the Tribunal and paid by the United Nations'. This payment requires a specific vote by the General Assembly which could easily fail to reach this item on the agenda or, following the precedent of the League, disregard the award, for, although the awards are final and without appeal, 'the present Statute may be amended by decision of the General Assembly'. This body may also amend the Staff Regulations, but without prejudice to the acquired rights of staff members. Once again, if League practice is any precedent, this refers merely to accrued salary and not to any right to notice or indemnity for dismissal.

THE INTERNATIONAL CIVIL SERVICE AND SECURITY CONSIDERATIONS

The Staff Regulations and the Statute of the Administrative Tribunal protect members of the staff in their relations with the Secretary-General, but they make no attempt to regulate the relations between the staff and member States, or between the Secretary-General and such States. In 1945 it was not expected

[39] Doc. A/INF/51, December 5, 1952.
[40] Doc. A/CN.5/2, July 19, 1950.

that this would be necessary. In fact, in 1946 Secretary of State Byrnes declared that the United States would not recommend, support or give clearance to employees or applicants for employment, basing his attitude on Article 100 of the Charter.[41] The first hints of a security attack on the Secretariat came in 1948. After the *coup* in Czechoslovakia the Czech Government sought to unseat, on the grounds of embezzlement and 'treason', Dr. Papánek the former Czech ambassador and delegate to the United Nations from his seat as a member of the Committee on Administrative and Budgetary Questions to which he had been elected as a specialist coming from Eastern Europe. Despite the attitude of the Government which had originally appointed him to the United Nations, Dr. Papánek was retained in his position.[42]

By 1949 the 'security and loyalty scare' was on in the United States and the State Department was finding it necessary to affirm that 'the internal adminstration of the Secretariat is the responsibility of the Secretary-General and the General Assembly' and to express its complete confidence in the Secretariat.[43] By 1952, however, the scare was in full swing. Popular fears, however irrational, had been fed by the fact that Alger Hiss had been Secretary-General of the San Francisco Conference, that Harry Dexter White was American Executive Director of the International Monetary Fund and that Frank Coe was its Secretary, although, as Professor Cohen has pointed out, 'the United Nations Secretariat—and this is equally true of the World Bank and Fund in Washington—are concerned with matters where security information plays a negligible role. Direct espionage or subversion is therefore no more or less likely to take place because of employment in the United Nations Secretariat'. Unfortunately, however, there is some evidence to show that the type of United States citizen employed in senior positions in the United Nations, especially among the earlier appointments, constituted 'security risks' when employed in equally senior positions in the United States Government between 1946 and 1952. It should also be remembered that many of these United States

[41] *Report of the Secretary-General on Personnel Policy,* Doc. A/2364, January 30, 1953, Annex 1, p. 15.
[42] Docs. A/C.5/SR.119–123; A/P.V. 151.
[43] U.S. Information Service, London, *Daily Wireless Bulletin,* No. 1040, July 28, 1949, No. 1045, August 4, 1949.

members of the Secretariat come from the same social, professional and intellectual background as Alger Hiss and the others who have been dismissed from United States Government service. Professor Cohen goes on to say: 'There is very little to hide in the relatively open files of a glass house, while a determinedly "subversive" civil servant can have no more influence on policy than astutely observant delegations or secretariat seniors permit him to have—namely little or none at all'.[44] Nevertheless, it is perhaps not surprising that the Chairman of the Internal Security Subcommittee of the Senate Judiciary Committee said, in 1952, that 'a Senate Committee cannot be estopped in its endeavour to secure facts relating to subversive activities on our shores by Americans regardless of their affiliation with an international organisation'.[45]

This outburst was occasioned by the number of United States members of the International Civil Service who, in appearing before Congressional Committees, resorted to the protection of the Fifth Amendment when questioned as to their participation in the Communist underground in the United States. It should be recognised that membership of 'subversive' organisations and participation in their activities directed against the United States cannot easily be regarded as falling within an official's duties as a member of the United Nations Secretariat. The Senator's comment expresses a problem that must face every host country of an international organisation, and not only as regards its own nationals. But Switzerland makes no similar claims regarding the World Health Organisation, nor do France and Italy, where Communism—which in western parlance appears synonymous with subversion and disloyalty—has a large following and considerable influence, concerning UNESCO and the Food and Agriculture Organisation respectively. In May, 1953, however, the Director-General of UNESCO suspended an American member of the staff for ignoring a New York grand jury's subpœna: 'His conduct was incompatible with his obligations as a staff member of UNESCO',[46] and by July it was agreed to align UNESCO's staff policy with that of the United Nations.[47] In March, 1954, the UNESCO Appeals Board found

[44] 'The United States and the United Nations Secretariat' (1953) 1 *McGill Law Journal*, p. 169, at p. 192.
[45] Friedmann, *loc. cit.*, note 12 above, p. 19.
[46] *The Times*, May 29, 1953. [47] *Ibid.*, July 4, 1953.

that although the Director-General was justified in requesting Mr. Leff to appear before the grand jury, there was no evidence that Mr. Leff's attitude had embarrassed UNESCO. The Board did not feel that his conduct reflected seriously upon the interests or repute of UNESCO, and considered that the Director-General's order should be rescinded. It stated that 'in the absence of any action on the part of the United States authorities, it was not up to the Director-General to substitute himself for those authorities and to seek to force Mr. Leff to respond to the subpœna'.[47a] A week later, however, Dr. Luther Evans again ordered Mr. Leff to return to New York for the grand jury investigation.[47b] If one concedes the principle to the host State, either with regard to its own nationals or alien 'traitors', it becomes difficult to deny it to every State which considers that the United Nations harbours a national 'traitor'.

Any doubts that may have existed as to the rights of the United States in this matter can be controverted by a 'reservation' to the Headquarters Agreement, whereby 'security reasons' permit the barring of entry to the United States or the Headquarters Area. The Secretariat denies the existence of this 'reservation', which 'is a unilateral reservation by the United States to a bilateral agreement', but it 'is enforceable in American courts'.[48] Similarly, under the Immunities Act the United States denied any special status to their own nationals, asserting their right to apply a *persona non grata* test and thus discriminating against them.

During 1952, perhaps in view of the forthcoming Presidential Election and the desire of both Parties to outshine each other on loyalty matters, pressure on the Secretary-General was stepped up. It was alleged, and in some cases proved, that United States officials had engaged in past, present or potential 'subversive' and 'espionage' activities; that many of them had refused testimony under cover of the Fifth Amendment; that some had been denied passports by the State Department and so could not travel on official United Nations business; that the United States

[47a] *Ibid.*, March 16, 1954.

[47b] *Ibid.*, March 24, 1954. For a full account of the case see *The Times Educational Supplement*, March 19, 1954. See also *The Observer*, March 28, 1954.

[48] Anon., 'Subversives in the UN', (1953) 5 *Stanford Law Review*, p. 769 at p. 777.

had announced its intention to deny admission to alien security risks coming from non-governmental organisations; that there was the danger of legislation making United Nations employment criminal without governmental clearance; and that there was a threat to call alien officials to testify, the sanction being the denial of re-entry.[49] In fact, it had been alleged that Mr. Zinchenko, the Soviet Assistant Secretary-General in charge of Security Council affairs, had access to United States security material in connection with the Korean War. The denial, however, appears to have been accepted.[50]

In January, 1953, the President signed an Executive Order calling for a loyalty check of all United States employees in the United Nations, and the Secretary-General 'indicated willingness to co-operate with the Order as being the best means of clearing up a situation that has severely shaken the morale of the staff and has involved the United Nations as a whole in much strident and ill-informed criticism'.[51]

By this time the Secretary-General had received the Opinion[52] of the Commission of Jurists[53] he had appointed to consider his personnel policy in the light of United States pressure. The Commission considered that members of the staff had no right not to answer when questioned by their own government; that refusal by the United States to issue a passport should put the Secretary-General on his guard as to the employee's background; that allegations of disloyalty should be investigated, but that the Secretary-General should have reasonable grounds of belief before dismissing any employee; and that the Secretary-General should not give United Nations archives to investigators or permit officials to give confidential information—this particular finding is of some significance in the light of *U.S.* v. *Keeney*. These answers were in reply to direct questions from the Secretary-General, but the Opinion went further: no conflict exists between allegiance to the State and responsibility to the United Nations; a conviction for 'disloyalty' should bar from employment—does this also apply

[49] Cohen, *loc. cit.*, note 44 above, p. 179.
[50] *The Times*, January 10, 1953.
[51] *Ibid.*
[52] Doc. A/INF/51, December 5, 1952. For summary, see Cohen, *loc. cit.*, pp. 180–185.
[53] Sir Edwin S. Herbert (U.K.), William D. Mitchell (U.S.A.) and P. Veldekins (Netherlands).

to Communist refugees?; allegations from *any source* that an employee has engaged or is *likely to be engaged* in subversive activity in the host country should put the Secretary-General on inquiry, and, if he has reasonable grounds for belief, he should discharge the staff member in question—the burden is on the Secretary-General, but what is subversive?; present active membership of the United States Communist Party should disqualify from employment, while past membership calls for investigation—this does not explain the position of foreign Communist Parties, but implies that it would probably be unwise to employ United States Communists even abroad; finally, it advised the creation of a new Advisory Panel distinct from existing bodies to investigate subversive allegations.

The Secretary-General accepted the Opinion almost in its entirety, but he said that by 'reasonable' he would understand preponderance of evidence, and would regard the Advisory Panel as being purely advisory. At the same time the United States set up an International Organisations Employees Board to be guided by the test whether there was 'reasonable doubt as to the loyalty of the person involved to the Government of the United States', and to provide the Secretary-General with such evidence as United States 'security' allowed. There is thus a potential clash between the United States concept of 'security risks' and the Secretary-General's idea of the 'preponderance of evidence'.

A number of the United States personnel dismissed by the Secretary-General in accordance with his new staff policy based on the Opinion of the Jurists appealed to the Administrative Tribunal. The Tribunal tended not to agree with the Jurists and in the *Gordon Case*[54] expressly rejected its finding on the Fifth Amendment. The Secretary-General declined to reinstate the affected employees and the Tribunal awarded large sums by way of compensation. The Tribunal's attitude was largely shared by Professor Rolin in an Opinion given at the request of the Federation of International Civil Servants' Associations. He pointed out that although 'none of the staff rules or regulations directly provides that international civil servants must comply with the summonses of judicial or other bodies, in certain cases the obligation to do so may follow from their duty to

[54] Doc. AT/DEC/29, August 21, 1953.

conduct themselves in a manner befitting their status as international civil servants and to keep the interest of their organisation in view. Thus, apart from exceptional cases in which the Secretary-General . . . feels obliged to invoke the privileges and immunities enjoyed by international organisations in opposition to compliance with a summons, an international civil servant will be committing serious misconduct if, by failing to comply with a summons, he renders himself liable to arrest, which would be injurious to the prestige of his organisation. On the other hand, it appears that an international civil servant who is summoned to appear as a witness in a foreign country is under no obligation to comply, and his organisation need not grant him permission to do so. Even if it is decided to comply with the summons, appearance may legitimately be made conditional on assurances from the authorities of the country to be visited that, after he has been heard, the staff member will be provided with such documents or exit visas as he requires to return to his duty station'.[55]

At its Eighth Session the General Assembly amended the Staff Regulations so that while staff members are permitted to exercise the vote they 'shall not engage in any political activity which is inconsistent with, or *might reflect upon*, the independence and impartiality required by their status as international civil servants'. The Secretary-General was also given wide powers of dismissal, even of employees under permanent contract, if this 'would be in the interest of the good administration of the Organisation and in accordance with the standards of the Charter'.[56] At the same time it was resolved to request the International Court of Justice for an advisory opinion on the Assembly's right to disregard the awards of the Administrative Tribunal, even though the Statute provides that these are final and without appeal.

While one should not attempt to prophesy or comment upon a matter which is *sub judice*, it is perhaps not improper to point out that if the Court is guided by the practice of the League, it could, without difficulty, uphold the right of the United Nations to dismiss its staff without compensation, without consideration of contractual clauses, and regardless of the awards of any

[55] Federation of International Civil Servants' Associations, *Advisory Opinion on the Rights and Obligations of International Civil Servants* (1953), p. 71.

[56] *The Times*, December 3, 1953.

Administrative Tribunal. Such a finding should not, however, be allowed to affect what may be described as the moral obligation which rests upon the United Nations to make some payment to those of its officials who have given it loyal service, but whose employment has been terminated because they have fallen foul of the national interests of a particular Member. Although the main interest has been focused on the United States, it should be borne in mind that other countries, especially those of Eastern Europe, might with equal justification protest at the continued employment of international civil servants who, formally at least, still possess the nationality of the States in question, but no longer recognise any duty of loyalty to those States and who, as political refugees, have no other means of livelihood than their salary from the United Nations.

In any cold war problems concerning the status of the International Civil Service are inevitable and are greatly aggravated by the establishment of the headquarters of what is almost a universal international organisation in the territory of a Great Power which is one of the leading participants in that cold war and which must, therefore, be excessively conscious of security problems, as they affect both nationals and aliens alike. It is probably too late to transfer the headquarters to the more moderate climate of a neutral country. Even were this done it would probably be found that protests by member States at the continued employment of security risks would be no fewer in number. What is essential is an adjustment of the interests of the international organisation with those of the national State, having the preservation of the independence and integrity of the International Civil Service as the supreme consideration. In the present international situation with its bipolarisation of power, any solution is likely to be temporary and a mere reflection of the subjection of international interests to the omnipotent national interests of the major Power in each of the world's halves, with the emphasis upon that in whose territory the organisation happens to have its seat.

THE REASONS BEHIND THE DECISIONS OF THE INTERNATIONAL COURT OF JUSTICE

E. Hambro

The teaching, literature and, most of all, the application of public international law have gone through a revolution in the course of the last couple of generations and have become increasingly realistic.[1] The actual practice of governments has, more and more, formed the material of the text-book writers.[2] More recently still the decisions of international courts[3] have been used skilfully and effectively as the raw materials of the scholar.[4] In the words of Dr. Schwarzenberger: 'There is more than enough source material available which, in our time, calls for a shift of emphasis from deduction to induction in the field of international law'.[5]

It is true that Article 38 of the Statute of the International Court of Justice still recognises 'the teachings of the most highly qualified publicists of the various nations' as a kind of second-class source of international law, namely, as a 'subsidiary means for the determination of rules of law'. But it is also a fact that the Court itself—and this applies to the Permanent Court of International Justice as well as to the International Court of Justice—has never once quoted an author. On the other hand, it has happened on more than one occasion that the judges who have given dissenting or individual opinions[6] have quoted authors

[1] A realistic law of nations does not, however, in the view of the writer, necessarily mean an exclusively positivist approach.

[2] It is enough here to mention the names of H. A. Smith, Hyde and Paul Guggenheim.

[3] A bibliography prepared by M. Douma, the highly experienced librarian and document officer of the International Court, is contained in the writer's *Case Law of the International Court* (1952).

[4] The most striking example is Dr. Schwarzenberger's most useful contribution, *International Law*, Vol. 1 (1949).

[5] Schwarzenberger, *op. cit.*, p. xlviii.

[6] The Court has decided that an opinion of a judge who disagrees with the decision of the Court should be called a 'dissenting' opinion and an opinion by a judge who supports the decision of the Court, but for different reasons, should be called an 'individual' opinion, *Year Book, 1950/1951*, p. 118: Comment to Article 74 of the Rules of Court.

in support of their views.[7] And the advocates of the parties seem at times to go through the whole literature of international law and to quote copiously, without any serious discrimination, anything from forgotten text-books[8] to obscure dissertations for a doctor's degree.[9] Quite clearly, the judge who examines the case before him will not ignore the depository of experience, practice and doctrine which can be found in text-books, monographs and articles on international law.

There is, however, a very clear tendency to rely more and more on the decisions of national and international courts, although the Court—as distinguished from individual judges—seems to have a strong reluctance ever to quote judicial decisions.[10] Nobody would deny that the decisions of the International Court of Justice are the most authoritative of them all. For that reason it is quite essential not only that the decisions should be right in themselves, but also that the reasons adduced in their support should carry conviction. It is, therefore, deeply disturbing to all believers in the rule of law when decisions of the Court are criticised on that point by highly qualified writers. And that is what has happened with regard to the *Fisheries Case*[11] between Norway and the United Kingdom, decided by the International Court of Justice,[12] particularly by the Chichele Professor of Public International Law at the University of Oxford.[13]

Some time before this judgment was delivered the learned

7 A list of such authors accompanies the index to the Court Reports.

8 More than 100 text-book writers from all periods of history were unearthed by learned and hard-working researchers during the case concerning the *Legal Status of Eastern Greenland* (1933, Series A/B, No. 53).

9 A curious example of this is the thesis by a German gentleman by the name of Münchmeyer who, it is believed, was killed during the second world war. His thesis was joyously rescued from oblivion by Sir Eric Beckett in the *Anglo-Norwegian Fisheries Case* (1951), 4 *The Pleadings*, pp. 95–97.

10 Norwegian decisions were, however, quoted by the Court in the *Anglo-Norwegian Fisheries Case* in order to prove Norwegian conceptions.

11 Not all articles on this judgment—and there will probably be many—are equally critical: see, for instance, Evensen, 'The Anglo-Norwegian Fisheries Case and its Legal Consequences', 46 *American Journal of International Law* (1952), p. 609; Johnson, 'The Anglo-Norwegian Fisheries Case', 1 *International and Comparative Law Quarterly* (1952), p. 145; and Smith, 'The Anglo-Norwegian Fisheries Case', 7 *Year Book of World Affairs* (1953), p. 283.

12 Decision of December 18, 1951, *I.C.J. Reports 1951*, p. 116.

13 Waldock, 'The Anglo-Norwegian Fisheries Case', 28 *British Year Book of International Law* (1951), p. 114.

Whewell, Professor of International Law at the University of Cambridge expressed similar views[14] on the general question of reasons for the decisions of the Court.

APPLICATION OR CREATION OF RULES OF LAW

It is difficult to have any real conception of the problem before knowing, first of all, to what extent the Court is bound by its own precedents and secondly how the decisions themselves are arrived at within the Court. Article 59 of the Statute of the International Court of Justice formulates the rule of *res judicata* in the following terms: 'The decision of the Court has no binding force except between the parties and in respect of that particular case'. The Permanent Court of International Justice had occasion to state that the purpose of that article was 'simply to prevent legal principles accepted by the Court in a particular case from being binding upon other States or in other disputes'.[15]

It is, of course, a fundamental and elementary rule that only the operative part of the judgment is binding in the strict sense of *res judicata*. But it is believed that the Court is in effect much more 'bound' by its own reasons than would appear from the wording of Article 59 of the Statute and from the above quotation from the case concerning *German Interests in Polish Upper Silesia*. One never sees the operative part quoted; but, on the contrary, one sees more and more frequently the reasoning of a judgment referred to and relied upon in legal arguments.

If the Court had as its sole function to decide what was right as between parties, one could attach less importance to the reasons. One could indeed even imagine unreasoned decisions. But such is not the case. The Court has also an important function outside the settlement of actual disputes submitted to it. Any court of law clarifies, formulates and, to a certain extent, develops the law it is called upon to apply. There is no hard and fast line between the application and the creation of law. This is acknowledged in a striking way by the common law system and the place of courts in the countries living under this legal system. This is, of course, fully understood by the judges of the Permanent Court of International Justice and its successor, as

[14] Lissitzyn, *The International Court of Justice*, 1951, Preface.

[15] *German Interests in Polish Upper Silesia* (1926, Series A, No. 7, p. 19). See also Cheng, *General Principles of Law as applied to International Courts and Tribunals*, 1953, Chap. 17.

well as all serious students of international law, even though the principle of *stare decisis* does not apply in international law. The law-creating role of the International Court of Justice was given some kind of official recognition by the General Assembly of the United Nations in 1947 when the Assembly passed a Resolution saying, among other things, '. . . that it is also of paramount importance that the Court should be utilised to the greatest practical extent in the progressive development of international law, both in regard to legal issues between States and in regard to constitutional interpretation'.[16] Any Court worthy of its name does in fact necessarily develop the legal system which it has the task of applying. The existing body of rules of international law owes much to the practice of international arbitral tribunals.[17] It is, furthermore, clear that no tribunal can or does contribute more to the development of public international law than the International Court of Justice, which is the organ of international law.[18]

RES JUDICATA

Although only the operative part of the judgment is binding in law (and in the case of Advisory Opinions, which in the practice of the Court possess the same juridical appearance, not even the operative part), the reasons are scrutinised and quoted, and, it is submitted, it is the reasoning behind the judgment and not the operative part which creates law in the broader sense and contributes to the development of international law. Still, it may be difficult to assess the real importance of the reasons.

It is not always easy to discern how much of the judgment is binding, and even the term 'binding' is far from unambiguous. However, what is of interest is to see what rules of law can be deduced from the reasoning of the Court as being so firm and of such a general applicability that the Court cannot be expected to reverse them. It is always difficult to interpret any judgment in such a way that one can be sure which part has been decisive

[16] United Nations Resolution 171 (III), adopted November 14, 1947.

[17] This is why the United Nations publishes its series of *Reports of International Arbitral Awards*; the first three volumes were in fact prepared by the Registry of the International Court of Justice under the supervision of the writer, whose *The Case Law of the International Court* (1952), was a further attempt to make judicial decisions more easily available.

[18] The Court described itself in this way in its judgment in the *Corfu Channel Case, I.C.J. Reports 1949*, p. 35.

and which part not. And even in spite of the categorical terms of Article 59 of the Statute, it seems clear that parts of the judgment, other than the operative part in the strict sense, are binding. This can be seen from the way in which the Court quotes its own reasoning in previous decisions. The Permanent Court had occasion to state in its Advisory Opinion concerning the *Polish Postal Service in Danzig* (1925): [19]

> 'Now, it is certain that the reasons contained in a decision, at least in so far as they go beyond the scope of the operative part, have no binding force as between the parties concerned.
>
> 'It is perfectly true that all the parts of a judgment concerning the points in dispute explain and complete each other and are to be taken into account in order to determine the precise meaning and scope of the operative portion. This is clearly stated in the award of the Permanent Court of Arbitration of October 14th, 1902, concerning the Pious Funds of the Californias, which has been repeatedly invoked by Danzig. The Court agrees with this statement. But it by no means follows that every reason given in a decision constitutes a decision; and it must be remembered that the Court of Arbitration applied the doctrine of *res judicata* because not only the parties but also the matter in dispute was the same (*il y a non seulement identité des Parties en litige, mais également identité de la matière*)'.

It would be an exaggeration to say that this statement is more than an indication to the effect that more than the operative part may be binding in so far as it constitutes *res judicata*.

The same remark applies to a statement by the same Court when it was called upon to interpret its own previous judgments in the *Chorzów Factory Case* (1927): [20]

> 'The natural inference to be drawn is that the second sentence of Article 60 was inserted in order, if necessary, to enable the Court to make quite clear the points which had been settled with binding force in a judgment, and, on the other hand, that a request which has not that object does not

[19] Series B, No. 11, pp. 29–30.

[20] Series A, No. 13, pp. 11–12. Article 60 of the Statute states: 'The judgment is final and without appeal. In the event of dispute as to the meaning or scope of the judgment, the Court shall construe it upon the request of any party'.

> come within the terms of this provision. In order that a difference of opinion should become the subject of a request for an interpretation under Article 60 of the Statute, there must therefore exist a difference of opinion between the parties as to those points in the judgment in question which have been decided with binding force. That does not imply that it must be beyond dispute that the point the meaning of which is questioned is related to a part of the judgment having binding force. A difference of opinion as to whether a particular point has or has not been decided with binding force also constitutes a case which comes within the terms of the provision in question, and the Court cannot avoid the duty incumbent upon it of interpreting the judgment in so far as necessary, in order to adjudicate upon such a difference of opinion'.

In view of this it is to be expected that the Court will be most reluctant to reverse its own statements of rules of international law. This reluctance is graphically illustrated in two cases that came before the International Court of Justice. In its advisory opinion concerning the *Interpretation of the Peace Treaties with Bulgaria, Hungary and Roumania* (first phase), the Court, anticipating the criticism of inconsistency,[21] stated that 'the circumstances of the present case are profoundly different from those which were before the Permanent Court of International Justice in the *Eastern Carelia Case*'.[22] In the second phase of the same case, the Court felt bound to give a somewhat restricted formulation of the rule of effectiveness[23] and formulated this so as to answer possible objections.[24]

These quotations show clearly, it is believed, that the rule laid down in Article 59 of the Statute cannot mean that the Court is completely free to disregard its own previous formulation of the law. Article 59 is also to some extent contradicted by Article 63, which opens up the possibility of an intervention by all the parties to multilateral treaties when the construction of that treaty 'is in question'.[25] The second paragraph of that

[21] This criticism is noticeable in the dissenting opinions of Judges Winiarski, Zoričič and Krylov.

[22] *I.C.J. Reports 1950*, p. 72.

[23] *Ibid.*, p. 229.

[24] See the dissenting opinion of Judge Read, *ibid.*, p. 238.

[25] It is not necessary for the purpose of this paper to examine the very difficult question of what is actually meant by the expression 'of a treaty being in question'.

article states that 'the construction given by the judgment will be equally binding upon' the intervening States. And it is quite clear that in nearly all cases the interpretation or construction of the treaty will not be found in the operative part, which hardly ever contains a statement of law, but in the reasoning.

There is an even more striking contradiction between the absolute rule in Article 59 and the enumeration of the sources of law in Article 38, where 'judicial decisions' are mentioned as a 'subsidiary means for the determination of rules of law',[26] 'subject to the provisions of Article 59'. It would be completely meaningless, it is submitted, that the decisions of the International Court of Justice itself should be the only legal decisions that did not create law. The inevitable conclusion is, therefore, that in spite of the absolute rule laid down in Article 59, the reasoning of the judgments of the International Court and its predecessor do create law and are in themselves a source of law for the future. It follows from the practice of the Court that it wants, and always has wanted, to build up a consistent body of rules, and by seeking to do so it has contributed not only to the clarification but also to the development of public international law.[27]

THE PROCEDURE FOR REACHING A DECISION

Given this importance of the reasons for the decision of the Court—and in this respect there is no difference between the judgments and the advisory opinions—it is obvious that the very greatest care is taken before a single sentence is incorporated into the judgment. It may be of interest, therefore, to explain how a Court like the International Court of Justice reaches its decisions. It is a large Court consisting of fifteen judges, and this in itself creates a difficulty. The fifteen judges are not only of different nationalities but they represent, in the words of Article 9 of the Statute of the Court, 'the main forms of civilization and the principal legal systems of the world'. Furthermore, very few of the judges have English or French as their mother tongue.

[26] The term 'subsidiary means' is, of course, highly unsatisfactory and ought not to be used.

[27] See Hudson, *The Permanent Court of International Justice* (1943), pp. 612–613, 626–630. See also Sørensen, *Les Sources du Droit international* (1946), p. 166, and Lauterpacht, *The Development of International Law by the Permanent Court of International Justice* (1934), pp. 8–9.

It should also be borne in mind that all the cases before the Court are between governments and that they are important and often extremely complicated cases, in which the documentation to be mastered by the members of the Court tends to become very voluminous indeed. The *Free Zones Case* between France and Switzerland was brought before the Court in March, 1928, and the final judgment was given in June, 1932. The documents in the case consisted of five closely printed volumes of 2,315 pages in all. The case concerning *Eastern Greenland* between Denmark and Norway was before the Court for nearly two years—from July, 1931, to May, 1933. The documents printed by the Court consisted of 4,240 pages in seven volumes apart from maps. The cases before the International Court of Justice are often equally voluminous. The printed documents in the *Corfu Channel Case,* between Albania and the United Kingdom, lasting from May, 1947, to December, 1949, are contained in five volumes consisting of 2,575 pages exclusive of indices and maps. The *Anglo-Norwegian Fisheries Case* lasted from December, 1949, to December, 1951. The printed pleadings and arguments, exclusive of maps, amounted to 2,905 pages in four volumes.

When the Court meets to consider a case which is ready for hearing, the judges have in front of them and have studied the mass of written pleadings. Thereafter, the oral hearings start with the hearing of counsel and advocates and, at times, also witnesses and experts. A full record of the hearings is taken down each day and distributed the same evening, and shortly thereafter a full translation into the other official language of the Court is distributed.[28] These transcripts in the original language are corrected by the parties and printed for the use of the members of the Court. This means that all evidence before the Court is available in printed form for the judges with the possible exception of certain documents deposited during oral hearings. The judicial work entails weeks of intensive study and hard work for the members of the Court as well as for the staff of the Registry. But even long and complicated cases like the *Corfu Channel Case* and the *Anglo-Norwegian Fisheries Case* were

[28] It should be remembered that the Court, unlike other organs of the United Nations, has under Article 39 of its Statute only two official languages, English and French.

terminated some six weeks after the last advocate had finished addressing the Court. The last oral hearing in the *Fisheries Case* was terminated on October 25 and the judgment was read in open court on December 18 at 10 a.m. The work of the judges is written as well as oral. Exchanges of confidential written notes are just as essential as the secret deliberations in the ornate Council Chamber.

In order to understand how the Court works and why the decisions have the form and the character they have, it is necessary to know the procedure by which the Court reaches its conclusions. There is no mystery involved. The procedure of the Court has been known for years. Even before the Court had made public the resolution laying down this procedure, the first Registrar of the Court, Dr. Åke Hammarskjöld, had explained it in a lecture he delivered on August 11, 1926, before the European Conference of American Professors of International Relations.[29] Later, Judge Hudson, in his classical work on the Permanent Court of International Justice, gave a full description of the working of the Court.[30] There is, therefore, really no serious reason for ignorance on this point and no excuse for treating the procedure of the Court in this respect as a mystery revealed only to the initiated. On the other hand, it is not so well known that it does not serve a useful purpose to describe it again. This practice is embodied in a resolution adopted on February 20, 1931, and revised on March 17, 1936. Although the resolution was originally treated as confidential, it was later published in the ordinary publications of the Court.[31] Reference to the discussions concerning this resolution can also be found in the publications of the Permanent Court of International Justice.[32] The International Court of Justice, on May 6, 1946, decided to adopt provisionally the method laid down in the resolution.[33]

The first step in the judges' private deliberations consists in a preliminary discussion even before the oral procedure begins. On

[29] 30 *Michigan Law Review* (1927), later published in Å. Hammarskjöld, *Juridiction internationale* (1938), p. 69 *et seq.*
[30] Hudson, *op. cit.*, n. 27 above, pp. 579–582.
[31] Series D, No. 1, fourth edition, p. 62.
[32] Series D, No. 2, second addendum, pp. 267, 268, 300–301; third addendum, pp. 749–750; fourth addendum, pp. 356–357.
[33] Series D, No. 1, second edition, May, 1947, as footnote to Article 30 of the Rules of Court, p. 63.

the basis of the written procedure the members of the Court discuss whether they find it necessary to call for supplementary explanations. In fact, it happens fairly frequently that either the Court itself or one of the judges asks questions, requests explanations or clarification or even additional documents. But on the whole the Bench takes a less active part than lawyers from an Anglo-Saxon country would expect. It has happened more than once that an advocate has asked for the guidance of the Court, trying to ascertain whether the Court would consider a certain element of the case to be important or irrelevant. No answer has been forthcoming and the advocate has had to cover ground which might later prove to have been no element in the decision.

After the oral hearing is over, the members of the Court are given a certain time to study the transcript of the oral arguments which they have already heard both in the original language and in translation. The judges then meet in the Council Chamber and discuss the case fully but provisionally. The President makes sure that all questions raised have been discussed and that each judge has made known his views in regard to them. After this full debate, each judge sets down his views in writing in an individual note. These notes are circulated to all the judges. On the basis of these notes the President of the Court draws up a plan of discussion which, however, neither affects 'the right of judges, at any stage in the deliberations, to call upon the Court to express its opinion upon any question or in any form which they may consider desirable, nor the freedom of the Court itself subsequently to modify as it may see fit the order of its discussion and the terms of the questions'. On the basis of the answers given to the questions put, the Court proceeds to the election of a drafting committee consisting of the President and of two judges chosen by the Court by secret ballot and by an absolute majority of votes. The Drafting Committee, which is assisted by the Registrar, with the benefit of all the documents in the case, the individual notes of the judges, the President's questionnaire and the answers given to it, elaborates a first draft. This draft in the two official languages is circulated to all the members of the Court, who have the opportunity of proposing amendments in writing. The Drafting Committee meets again to consider the proposed amendments, whereupon a second draft is prepared and

circulated to all members of the Court. On the basis of this second draft the first reading takes place in the Council Chamber. After a thorough debate, new amendments may be adopted and other passages referred to the Drafting Committee for reconsideration. After the first reading the dissenting judges have an opportunity to write their dissenting opinions, and those members of the Court who accept the operative part of the judgment but on different grounds, have the right to give their individual opinions. The final draft is made with full knowledge of the dissenting views which the minority judges intend to express.

INDIVIDUAL AND DISSENTING OPINIONS

There is thus no doubt that the judgments of the Court are the result of collective drafting. And it is submitted that this may explain why the reasoning is not always as full and as cogent as could be wished for. It is necessary to reach a common result and often enough that means no more than the highest common factor. A judge may say that he will give an individual opinion if a certain passage is not changed or deleted.[34] Because the Court is so very reluctant to reverse its own decisions and its own reasoning, it is to be expected that the pronouncement will be very economical in this respect. There is, however, a danger in this in so far as the individual opinions of judges tend to be better argued and often to carry greater conviction than the collective opinion of the Court. One illustration of this is the striking statement by the Permanent Court in the *Eastern Greenland Case* (1933) where the Court considered the so-called Ihlen Declaration, wherein the Norwegian Foreign Minister gave an assurance to the Danish Minister in Oslo which, if it were considered binding on his government, would in fact give the Foreign Minister the power to bind his country by an oral reply to a greater extent than the government itself would be entitled to do under treaty. The Court states:[35] 'The Court considers it beyond all dispute that a reply of this nature given by the Minister for Foreign Affairs on behalf of his Government in response to a request by the diplomatic representative of a foreign power, in regard to a question falling within his province, is

[34] This was stated plainly by Judge Carneiro in an article in the Brazilian newspaper, *Jornal do Commercio*, March 1, 1953.
[35] Series A/B, No. 53, p. 71.

binding upon the country to which the Minister belongs'. Judge Anzilotti in his opinion gave the following much fuller explanation on this point: [36]

> 'The outcome of all this is therefore an agreement, concluded between the Danish Minister at Christiania, on behalf of the Danish Government, and the Norwegian Minister for Foreign Affairs, on behalf of the Norwegian Government, by means of purely verbal declarations.
>
> 'The validity of this agreement has been questioned, having regard, in the first place, to its verbal form, and to the competence of the Minister for Foreign Affairs.
>
> 'As regards the form, it should be noted, to begin with, that as both parties are agreed as to the existence and tenor of these declarations, the question of proof does not arise. Moreover, there does not seem to be any rule of international law requiring that agreements of this kind must necessarily be in writing in order to be valid.
>
> 'The question of the competence of the Minister for Foreign Affairs is closely connected with the contents of the agreement in question; and these have already been determined. . . . In my opinion, it must be recognised that the constant and general practice of States has been to invest the Minister for Foreign Affairs—the direct agent of the chief of the State—with authority to make statements on current affairs to foreign diplomatic representatives, and in particular to inform them as to the attitude which the government, in whose name he speaks, will adopt in a given question. Declarations of this kind are binding upon the State.
>
> 'As regards the question whether Norwegian constitutional law authorised the Minister for Foreign Affairs to make the declaration, that is a point which, in my opinion, does not concern the Danish Government; it was M. Ihlen's duty to refrain from giving his reply until he had obtained any assent that might be requisite under the Norwegian laws'.

More recent and even more striking examples of the dangers inherent in laconic and elliptic drafting can be found in the Advisory Opinion of May 28, 1948, concerning *Conditions of*

[36] *Ibid.*, at p. 91.

Admission of a State to Membership in the United Nations (1948). The opinion was only given by a majority of nine to six, and two of the nine gave individual opinions which still further weakened the majority. This was, moreover, pointed out to the General Assembly when the opinion was discussed and adopted.[37]

In answer to the question posed,[38] the Court stated: 'The request for an opinion does not refer to the actual vote. Although the members are bound to conform to the requirements of Article 4 in giving their votes, the General Assembly can hardly be supposed to have intended to ask the Court's opinion as to the reasons which, in the mind of a member, may prompt its vote. Such reasons, which enter into a mental process, are obviously subject to no control. Nor does the request concern a member's freedom of expressing its opinion. Since it concerns a condition or conditions on which a member "makes its consent dependent", the question can only relate to the statements made by a member concerning the vote it proposes to give'.[39]

However, a minority of the Court, consisting of Judges Basdevant, Winiarski, Sir Arnold McNair and Read, stated in a cogently argued individual opinion: 'In our opinion, it is impossible to regard the first question as one which relates solely to the statements or the arguments which a member of the United Nations may make or put forward in the Security Council or in the General Assembly when those organs are considering a request for admission, and not to the reasons on which that member bases its vote. The Court is asked whether a member is "juridically entitled to make its consent to the admission" dependent on conditions not provided for by paragraph 1 of Article 4. Its consent to admission is expressed by its vote. It is therefore the vote that is in question, as is confirmed by the expression "subject its affirmative vote" used in the second question, which is complementary to the first. But it would be a strange interpretation which gave a member freedom to base its vote upon a certain consideration and at the same time forbade it to invoke that consideration in the discussion preceding the vote. Such a result would not conduce to that frank exchange of views which is an

[37] See, on the reception of this opinion, Humber, 'L'autorité des Avis consultatifs de la Cour internationale de Justice', 21 *Acta Scandinavica Juris Gentium* (1951), p. 26.
[38] *I.C.J. Reports 1947–1948*, p. 58.
[39] *Ibid.*, p. 60.

essential condition of the healthy functioning of an international organisation. It is true that it is not possible to fathom the hidden reasons for a vote and there exists no legal machinery for rectifying a vote which may be cast contrary to the Charter in the Security Council or the General Assembly. But that does not mean that there are no rules of law governing members of the United Nations in voting in either of these organs; an example is to be found in paragraph 1 of Article 4 prohibiting the admission of a new member which does not fulfil the qualifications specified therein. This distinction, which it has been attempted to introduce between the actual vote and the discussion preceding it, cannot be accepted; it would be inconsistent with the actual terms of the question submitted to the Court, and its recognition would involve the risk of undermining that respect for good faith which must govern the discharge of the obligations contained in the Charter (Article 2, paragraph 2)'.[40]

A similar example from the same opinion occurs on page 63 of the report, where the majority finds 'that the text is sufficiently clear; consequently, it does not feel that it should deviate from the consistent practice of the Permanent Court of International Justice, according to which there is no occasion to resort to preparatory work if the text of a convention is sufficiently clear in itself'. The above mentioned judges, in their dissenting opinion (p. 87 *et seq.*), on the other hand, found it essential to discuss the preliminary work very extensively.

The important thing is perhaps not so much whether the majority or the minority is right on this particular point. The important issue, so far as the argument of this paper is concerned, is that it cannot be expected that affirmations to the effect that a certain conception is obvious or that a text is clear can carry conviction by themselves alone. This is especially so when some of the members of the Court do not find the text obvious or clear or perhaps even find the opposite interpretation clear or obvious although they, out of deference for their colleagues, do not say so.

THE SIGNIFICANCE OF THE REASONS

It has been suggested that the reasons behind a decision do not give a genuine picture of the thought process by which the result

[40] *I.C.J. Reports 1947–1948*, pp. 82–83

has been arrived at.[41] It seems clear that a collective draft of such a large Court cannot give a correct picture of the thought process by which the individual judges have reached the common result. It should also be borne in mind 'that most lawyers have an almost instinctive dislike of committing themselves any further than is necessary for the decision of the particular case'. 'In that case', adds a distinguished British scholar, 'we shall understand that it would be unreasonable to expect in the collective judgment any exposition of the principles upon which it is based'.[42]

However, another equally learned and prominent among the 'most highly qualified publicists' in Great Britain has expressed himself as follows: 'Now, it will be asked, is this variety of decided questions a necessary element in the work of the Court? Does not the Court wander away from the main point for the sake of *obiter dicta*? Does not the Court, in which the professorial element is not inconsiderable, indulge in little lectures and academic disquisitions which might well be avoided? Does it not perhaps happen that the judgment is not an organic whole but an artificial accumulation of individual opinions? All these questions—which have been discreetly asked here and there—must be answered in the negative. Admittedly, the pronouncements of the Court are long, but it is difficult to see how this can be avoided. And, for reasons to be stated, it is devoutly to be wished that they shall continue to be so'.[43]

It is believed that Professor Lauterpacht is eminently right when he expresses the wish that the decisions of the Court should be long. They must be well, fully and closely argued in order to carry conviction and in order to develop international law. It is—if one dares to use such a strong word—quite obvious that all Foreign Offices which seriously contemplate using the Court either for cases between governments, or which are prepared to support requests for advisory opinions, will scrutinise the decisions before they make up their minds. It is also a fact that the General Assembly of the United Nations both in plenary session and in committee scrutinise the opinions. This is not wholly

[41] Sørensen, *op. cit.*, n. 27 above, p. 245.
[42] Smith, *loc. cit.*, n. 11 above, p. 294. This article on the *Anglo-Norwegian Fisheries Case* is much less critical than that by Professor Waldock, *loc. cit.*, n. 11 above.
[43] Lauterpacht, *op. cit.*, n. 27 above, pp. 16–17.

satisfactory, since the General Assembly is not a court of appeal. An opinion is requested and it is then for the Court, and for it alone, to lay down the law. However, in the political climate of today the Court has had to give opinions on highly explosive questions and every sentence of the opinions has been discussed. This is a fact one must reckon with. This may also to some extent explain why the Court is extremely careful in laying down rules of international law. And it is submitted that the reasons for a judgment really have this importance. The statements of law contained in the judgment do represent the considered opinion of the judges who constitute the majority. The reasons may in the long run be of greater importance than the operative part.

If the Court cannot give satisfaction in this important respect its usefulness will be seriously diminished. Admittedly, there is a dilemma here. The Court is meant to be a real world Court. This would not be the case if all the judges did not contribute to the formation of the decisions. Once the difficulties of collective drafting are admitted outside the Court a greater understanding might be shown by outsiders, and once the Court realises the serious wish to have fully reasoned cases, it might perhaps with experience see its way to modifying its practice in such a way that none of 'the most highly qualified publicists of the various nations' can with any semblance of justice criticise the decisions as being laconic or elliptic.

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